THE CASE AGAINST QUALIFIED IMMUNITY

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INTRODUCTION

In many ways, qualified immunity's shield against government damages liability is stronger than ever. The United States Supreme Court has made clear that qualified immunity should protect "all but the plainly incompetent or those who knowingly violate the law."[1] The Court dedicates an outsized portion of its docket to reviewing—and virtually always reversing—denials of qualified immunity in the lower courts.[2] In these decisions, the Court regularly chides courts for denying qualified immunity motions given the importance of the doctrine "to society as a whole."[3] And the Court's recent qualified immunity decisions make it seem nearly impossible to find clearly established law that would defeat the defense.[4]

But there are also cracks in qualified immunity's armor. Most recently, in his concurrence in *Ziglar v. Abbasi*, Justice Thomas criticized the doctrine for bearing little resemblance to the common law at the time the Civil Rights Act of 1871 became law, and for being defined by "precisely the sort of 'free-wheeling policy choice[s]' that we have previously disclaimed the power to make."[5] Indeed, Justice Thomas recommended that "[i]n an appropriate case, we should reconsider our qualified immunity jurisprudence."[6] Much attention has been paid to Justice Thomas's call to reconsider qualified immunity doctrine in *Ziglar*.[7] But Justices have been raising questions about

1 Malley v. Briggs, 475 U.S. 335, 341 (1986).

2 *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 82 (2018) (observing that the Supreme Court has decided thirty qualified immunity cases since 1982, and has found that defendants violated clearly established law in just two of those cases). The Court's recent decisions in *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018), and *Kisela v. Hughes*, 138 S. Ct. 1148 (2018), puts the count at thirty-two. Twenty of those decisions have been issued within the past ten years. If one includes cases in which qualified immunity is invoked less directly, the count would be higher. *See, e.g.*, Tolan v. Cotton, 134 S. Ct. 1861 (2014); Scott v. Harris, 550 U.S. 372 (2007).

3 *See, e.g.*, White v. Pauly, 137 S. Ct. 548, 551–52 (2017) ("In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases. The Court has found this necessary both because qualified immunity is important to 'society as a whole,' and because as 'an immunity from suit,' qualified immunity 'is effectively lost if a case is erroneously permitted to go to trial.' Today it is again necessary to reiterate the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'" (first quoting City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015); then quoting Pearson v. Callahan, 555 U.S. 233, 231 (2009))); *Sheehan*, 135 S. Ct. at 1774 n.3 ("Because of the importance of qualified immunity 'to society as a whole,' the Court often corrects lower courts when they wrongly subject individual officers to liability." (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982))).

4 *See infra* notes 109–12 and accompanying text (describing the Court's recent qualified immunity decisions).

5 Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring) (alteration in original) (quoting Rehberg v. Paulk, 566 U.S. 356, 363 (2012)).

6 *Id.* at 1872.

7 *See, e.g.*, Will Baude, *"In an Appropriate Case, We Should Reconsider Our Qualified Immunity Jurisprudence,"* WASH. POST: THE VOLOKH CONSPIRACY (June 19, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/19/in-an-appropriate-case-

qualified immunity for decades. In 1997, Justice Breyer suggested that defendants should not be protected by qualified immunity if they are certain to be shielded from financial liability by their employer.[8] In 1992, Justice Kennedy indicated that qualified immunity doctrine might be unnecessary to shield government defendants from trial given the Court's summary judgment jurisprudence.[9] In 2015, and again in 2018, Justice Sotomayor expressed concern that the Court's qualified immunity decisions contribute to a culture of police violence.[10]

If the Court did find an appropriate case to reconsider qualified immunity, and took seriously available evidence about qualified immunity's historical precedents and current operation, the Court could not justify the continued existence of the doctrine in its current form. Ample evidence undermines the purported common-law foundations for qualified immunity.[11] Research examining contemporary civil rights litigation against state and local law enforcement shows that qualified immunity also fails to achieve its intended policy aims. Qualified immunity does not shield individual

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we-should-reconsider-our-qualified-immunity-jurisprudence/?utm_term=.18443bf27fbd (describing Justice Thomas's concurrence as offering "some promising skepticism . . . about the doctrine of qualified immunity"); Matt Ford, *American Policing Goes to the Supreme Court*, ATLANTIC (Oct. 1, 2017), https://www.theatlantic.com/politics/archive/2017/10/supreme-court-carpenter-cases/541524/ (describing Justice Thomas's concurrence as "a glimmer of light . . . for qualified-immunity critics"); Perry Grossman, *Clarence Thomas to the Rescue?*, SLATE (June 21, 2017), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/06/in_ziglar_v_abbasi_clarence_thomas_signals_his_support_for_civil_rights.html (describing Justice Thomas's concurrence as "the most direct call for change [of qualified immunity doctrine] to date").

8 *See* Richardson v. McKnight, 521 U.S. 399, 411 (1997) (concluding that private prison guards are not entitled to qualified immunity in part because "insurance increases the likelihood of employee indemnification and to that extent reduces the employment-discouraging fear of unwarranted liability potential applicants face").

9 *See* Wyatt v. Cole, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring) ("*Harlow* was decided at a time when the standards applicable to summary judgment made it difficult for a defendant to secure summary judgment regarding a factual question such as subjective intent, even when the plaintiff bore the burden of proof on the question; and in *Harlow* we relied on that fact in adopting an objective standard for qualified immunity. However, subsequent clarifications to summary-judgment law have alleviated that problem . . . ." (citations omitted)).

10 *See* Mullenix v. Luna, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting) ("When Mullenix confronted his superior officer after the shooting, his first words were, 'How's that for proactive?' . . . [T]he comment seems to me revealing of the culture this Court's decision supports when it calls it reasonable—or even reasonably reasonable—to use deadly force for no discernible gain and over a supervisor's express order to 'stand by.' By sanctioning a 'shoot first, think later' approach to policing, the Court renders the protections of the Fourth Amendment hollow."); *see also* Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (arguing that the Supreme Court's decision reversing the Ninth Circuit's denial of qualified immunity for an officer who shot a woman holding a knife "tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished").

11 *See infra* Part I for further discussion of this argument.

officers from financial liability.[12] It almost never shields government officials from costs and burdens associated with discovery and trial in filed cases.[13] And it appears unnecessary to encourage vigorous enforcement of the law.[14]

The Court could, alternatively, overhaul or eliminate qualified immunity because—as Justice Sotomayor has observed—its application all too often "renders the protections of the Fourth Amendment hollow."[15] Although few cases are dismissed on qualified immunity grounds, multiple aspects of the doctrine—including its disregard of officers' bad faith, exacting requirements to clearly establish the law, and license to courts to grant qualified immunity without ruling on the underlying constitutional claims—hamper the development of constitutional law and may send the message that officers can disregard the law without consequence. The fact that qualified immunity doctrine fails to protect government officials from financial liability or other burdens of suit makes the doctrine's imbalance between government and individual interests especially concerning and unwarranted.

If a majority of the Court is convinced by one or more of these arguments, they should restrict or do away with the qualified immunity defense altogether. In fact, five of the Justices currently on the Court have authored or joined opinions expressing sympathy with one or more of these arguments.[16] Why, then, has the Court continued so vigorously to apply the doctrine, often in unanimous or per curiam decisions? In my view, the most likely explanation is that Justices fear eliminating or restricting qualified immunity would alter the nature and scope of policing or constitutional litigation in ways that would harm government officials and society more generally.[17] For reasons that I will describe elsewhere, I believe there would be no parade of horribles were qualified immunity eliminated.[18] But even if the Court does not find my assurances to be convincing, unsubstantiated fears about the future are insufficient reason to maintain a doctrine unmoored to common-law principles, unable or unnecessary to achieve the Court's policy goals, and unduly deferential to government interests. The Justices can end qualified immunity in a single decision, and they should end it now.

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12 *See infra* Section II.A for further discussion of this argument.

13 *See infra* Section II.B for further discussion of this argument.

14 *See infra* Section II.C for further discussion of this argument.

15 *Mullenix*, 136 S. Ct. at 316 (Sotomayor, J., dissenting); *see infra* Part III for further discussion of this argument.

16 *See supra* notes 5, 8–10 and accompanying text (describing Justice Thomas's concurrence in *Ziglar*, Justice Breyer's opinion in *Richardson* (which was joined by Justice Ginsburg), Justice Kennedy's concurrence in *Wyatt*, Justice Sotomayor's dissent in *Mullenix*, and Justice Sotomayor's dissent in *Kisela* (which was joined by Justice Ginsburg)).

17 For some alternative explanations for the Court's behavior, see *infra* notes 220–23 and accompanying text.

18 *See* Joanna C. Schwartz, After Qualified Immunity (unpublished manuscript) (draft on file with author).

I. Qualified Immunity Has No Basis in the Common Law

Qualified immunity shields executive branch officials from damages liability, even when they have violated the Constitution, if they have not violated "clearly established law."[19] The Supreme Court first announced that executive officers were entitled to qualified immunity in 1967.[20] In that decision, *Pierson v. Ray*, the Court described qualified immunity as grounded in common-law defenses of good faith and probable cause that were available for state-law false arrest and imprisonment claims.[21] The Court in *Pierson* appeared to focus on common-law defenses available in Mississippi at the time the case was filed.[22] But, in subsequent cases, the Court has repeatedly explained that qualified immunity is drawn from common-law defenses that were in effect in 1871, when Section 1983 became law.[23]

Despite the Court's repeated invocation of the common law, several scholars have shown that history does not support the Court's claims about qualified immunity's common-law foundations. When the Civil Rights Act of 1871 was passed, government officials could not assert a good faith defense to liability.[24] A government official found liable could petition for indemnification and thereby escape financial liability.[25] But if a government official engaged in illegal conduct he was liable without regard to his subjective good faith.[26] Indeed, the Supreme Court expressly rejected a good faith defense

19 Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

20 *See* Pierson v. Ray, 386 U.S. 547 (1967).

21 *Id.* at 556–57 ("We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983.").

22 *See id.* at 555 (making clear that the good faith defense that the court of appeals recognized, and the Court extended to Section 1983 claims, was drawn from a "limited privilege under the common law of Mississippi").

23 *See* Baude, *supra* note 2, at 53–54; *see also* Filarsky v. Delia, 566 U.S. 377, 383 (2012) ("Our decisions have recognized similar immunities under § 1983, reasoning that common law protections 'well grounded in history and reason' had not been abrogated 'by covert inclusion in the general language' of § 1983." (quoting Imbler v. Pachtman, 424 U.S. 409, 418 (1976))); Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993) (asking whether immunities "were so well established in 1871, when § 1983 was enacted, that 'we presume that Congress would have specifically so provided had it wished to abolish' them" (quoting *Pierson*, 386 U.S. at 555)); Malley v. Briggs, 475 U.S. 335, 342 (1986) ("[O]ur role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice, and that we are guided in interpreting Congress' intent by the common-law tradition.").

24 *See* James E. Pfander, Constitutional Torts and the War on Terror 16–17 (2017); *see also* Baude, *supra* note 2, at 55; David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 14–21 (1972); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 Case W. Res. L. Rev. 396, 414–22 (1987).

25 *See* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1924 (2010).

26 *See* Baude, *supra* note 2, at 56; *see also* Albert W. Alschuler, Herring v. United States*: A Minnow or a Shark?*, 7 Ohio St. J. Crim. L. 463, 465 (2010).

to liability under Section 1983 after it became law.[27] The Court's conclusion in *Pierson* that a good faith immunity protected the defendant officers from liability is simply "inconsistent with the common law and many of the Court's own decisions."[28]

Moreover, even if one believed that the Court's decision in *Pierson* accurately reflected the common law, today's qualified immunity doctrine bears little resemblance to the protections announced in *Pierson*. Although qualified immunity was initially available to government officials who acted with a subjective, good faith belief that their conduct was lawful, the Supreme Court, in *Harlow v. Fitzgerald*, eliminated consideration of officers' subjective intent and focused instead on whether officers' conduct was objectively unreasonable.[29] Even when a plaintiff can demonstrate that a defendant was acting in bad faith, that evidence is considered irrelevant to the qualified immunity analysis.[30] The Court has repeatedly made clear that a plaintiff seeking to show that an officer's conduct was objectively unreasonable must find binding precedent or a consensus of cases so factually similar that every officer would know that their conduct was unlawful.[31] Defendants are entitled to interlocutory appeals of qualified immunity denials.[32] And qualified immunity applies to all types of constitutional claims, not only claims for which an officer's good faith might otherwise be relevant.[33] None of these aspects of qualified immunity can be found in the common law when Section 1983 became law, or in *Pierson*.

To its credit, the Supreme Court has long recognized that it cannot ground its qualified immunity jurisprudence in the common law. Indeed, thirty years ago, the Supreme Court acknowledged that it had "completely reformulated qualified immunity along principles not at all embodied in the common law."[34] The Court reformulated qualified immunity with a specific goal in mind—to shield government officials against various harms associated with insubstantial lawsuits.[35] In the next Part, I will show that qualified immunity is neither necessary nor particularly well suited to achieve this goal. But Justice Thomas has recently raised a more fundamental critique of the Court's turn away from the common law.

In his concurrence in *Ziglar v. Abbasi*, Justice Thomas writes that qualified immunity should conform to the "common-law backdrop against which

27 *See* Baude, *supra* note 2, at 57 (describing Myers v. Anderson, 238 U.S. 368 (1915)).

28 Alschuler, *supra* note 26, at 504; *see also* Woolhandler, *supra* note 24, at 464 n.375.

29 *See* Alschuler, *supra* note 26, at 506 ("A justice who favored giving § 1983 its original meaning or who sought to restore the remedial regime favored by the Framers of the Fourth Amendment could not have approved of either *Pierson* or *Harlow*.").

30 *See, e.g.*, *infra* note 126 and accompanying text (describing the Supreme Court's decision in *Mullenix v. Luna*).

31 *See infra* notes 111–12 and accompanying text (describing these decisions).

32 *See* Mitchell v. Forsyth, 472 U.S. 511, 526–27 (1985).

33 *See* Baude, *supra* note 2, at 60–61 (describing this as a "mismatch problem").

34 Anderson v. Creighton, 483 U.S. 635, 645 (1987).

35 *See* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982); *see also* Wyatt v. Cole, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring).

Congress enacted the 1871 Act," rather than "the sort of 'freewheeling policy choice[s]' that we have previously disclaimed the power to make."[36] If four other Justices share Justice Thomas's view, then they could vote to limit qualified immunity to those defenses available at common law in 1871.[37] As the discussion in this Part makes clear, conforming qualified immunity doctrine to the common law in place in 1871 would require dramatically limiting qualified immunity doctrine or doing away with the defense altogether. On the other hand, if five or more Justices do not mind that qualified immunity doctrine currently takes a form far different than the common law in 1871, and do not mind that the doctrine has been structured by the Court to advance its interest in shielding government officials from burdens associated with being sued, then it becomes important to consider the extent to which the doctrine achieves its policy goals. I turn to this topic next.

II. Qualified Immunity Does Not Achieve Its Intended Policy Goals

When the Court created qualified immunity in 1967, it explained that the doctrine would protect government officials acting in good faith from financial liability.[38] Fifteen years later, the Court expanded the list of government interests advanced by qualified immunity to include protection against "the diversion of official energy from pressing public issues," "the deterrence of able citizens from acceptance of public office," and "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"[39] In its most recent decisions, the Court focuses primarily on qualified immunity's presumed ability to shield government officials from burdens associated with discovery and trial.[40] The Court claims that qualified immunity achieves these policy goals, but has offered no evidence to support this claim.[41] Instead, all available evidence undermines each of the Court's policy justifications for the doctrine.

I have examined the extent to which qualified immunity doctrine serves its policy goals in lawsuits filed against state and local law enforcement. I

36 Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring) (alteration in original) (quoting Rehberg v. Paulk, 566 U.S. 356, 363 (2012)).

37 Justice Kennedy has raised similar concerns, observing that because qualified immunity was drawn from common-law defenses available when Section 1983 was enacted, "[t]hat suggests . . . that we may not transform what existed at common law based on our notions of policy or efficiency." *Wyatt*, 504 U.S. at 171–72 (Kennedy, J., concurring).

38 *See generally* Pierson v. Ray, 386 U.S. 547 (1967); *see also infra* notes 44–45 and accompanying text.

39 *Harlow*, 457 U.S. at 814 (alteration in original) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

40 *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 15 (2017) (describing these decisions).

41 *See* Malley v. Briggs, 475 U.S. 335, 341 (1986) ("The *Harlow* standard is specifically designed to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment,' and we believe it sufficiently serves this goal." (quoting *Harlow*, 457 U.S. at 818)).

have found, contrary to the Court's assertions, that qualified immunity is unnecessary to shield law enforcement officers from the financial burdens of being sued because they are virtually never required to contribute to settlements and judgments entered against them. I have additionally found that qualified immunity is unnecessary and ill-suited to shield government officials from burdens of discovery and trial, as it is very rarely the reason that suits against law enforcement officers are dismissed. Finally, available evidence suggests that the threat of being sued does not play a meaningful role in job application decisions or officers' decisions on the street.

It could be that different types of government actors have different rules on indemnification or that litigation against these actors is resolved in different ways. But this possibility does not weaken the case against qualified immunity. Law enforcement is a common defendant in Section 1983 cases, and cases involving law enforcement have played a significant role in the development of the Supreme Court's qualified immunity jurisprudence.[42] Moreover, given available evidence of qualified immunity's failure to achieve its intended policy goals, the burden should now rest on other types of government officials to show how they are different.[43]

A. Qualified Immunity Does Not Shield Officers from Financial Burdens

Qualified immunity has long been justified as a shield from financial liability. As the Court explained in *Pierson*, qualified immunity was necessary because "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."[44] The fear of damages liability has repeatedly been invoked by the Court as justification for qualified immunity.[45] But my research has shown that state and local law

42 *See* Baude, *supra* note 2, at 88–90 (showing that thirteen of the Supreme Court's thirty qualified immunity cases since 1982 have involved state or local law enforcement defendants). The Supreme Court's 2018 decisions in *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018), and *Kisela v. Hughes*, 138 S. Ct. 1148 (2018), also involved local law enforcement defendants. Accordingly, fifteen of the Court's thirty-two qualified immunity decisions have considered the propriety of qualified immunity for state or local law enforcement defendants. Another seven cases have involved federal law enforcement officers.

43 I disagree with the view that the methodological limitations of these studies—including their focus on law enforcement defendants—necessitate further research "[b]efore calling for a blanket elimination of qualified immunity." Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1878 (2018). Although empirical studies will always have methodological limitations and there will always be additional empirical questions that can be posed and answered, all available evidence supports the conclusion that qualified immunity doctrine does not achieve its intended policy objectives. The burden should now shift to skeptics to unearth convincing evidence that supports a contrary conclusion.

44 Pierson v. Ray, 386 U.S. 547, 555 (1967).

45 *See, e.g.*, Forrester v. White, 484 U.S. 219, 223 (1988) ("Special problems arise . . . when government officials are exposed to liability for damages. To the extent that the

enforcement officers should have no fear of being mulcted in damages. A combination of state laws, local policies, and litigation dynamics ensures that officers are virtually never required to pay anything toward settlements and judgments entered against them.

In a prior study, I gathered information from eighty-one state and local law enforcement agencies—including forty-four of the nation's largest agencies and thirty-seven smaller agencies—regarding the total number of damages actions naming an individual officer that resulted in a payment to a plaintiff over a six-year period, the amount paid to plaintiffs in these cases, the number of instances in which an individual officer contributed to a payment, and the amount the officer(s) contributed.[46] I found that officers employed by these eighty-one jurisdictions virtually never contributed to settlements and judgments during the six-year study period.[47] I additionally concluded, based on correspondence with government officials in the course of my research, that law enforcement officers almost never pay for defense counsel—instead, counsel is provided by the municipality, the municipal insurer, or the union.[48]

Among the forty-four largest agencies in my study, 9225 cases were resolved with payments to plaintiffs, and plaintiffs were paid more than $735 million in these cases.[49] But individual officers contributed to settlements in just 0.41% of these cases, and paid approximately 0.02% of the total awards to plaintiffs.[50] Although punitive damages are specifically intended to punish defendants who act with "evil motive or intent," or "reckless or callous indifference to the federally protected rights of others,"[51] officers did not pay a penny of the more than $9.3 million that juries awarded in punitive damages during the study period.[52] Indeed, I found multiple instances in which

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threat of liability encourages these officials to carry out their duties in a lawful and appropriate manner, and to pay their victims when they do not, it accomplishes exactly what it should. By its nature, however, the threat of liability can create perverse incentives that operate to *inhibit* officials in the proper performance of their duties."); Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982) (reporting that "public officers require [some form of immunity protection] to shield them from undue interference with their duties and from potentially disabling threats of liability"). This fear was also invoked by Justice Gorsuch when he was on the Tenth Circuit. *See* Cortez v. McCauley, 478 F.3d 1108, 1141 (10th Cir. 2007) (en banc) (Gorsuch, J., concurring in part and dissenting in part) ("The qualified immunity doctrine . . . is intended to protect diligent law enforcement officers, in appropriate cases, from the whipsaw of tort lawsuits seeking money damages . . . . Before a law enforcement officer may be held financially liable, the Supreme Court requires a plaintiff to establish not only that his or her rights were violated but also that those rights were [clearly established].").

46 For additional information about the jurisdictions, my methodology, and my findings, see Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 902–12 (2014).

47 *See generally id.*

48 *Id.* at 915–16.

49 *Id.* at 890.

50 *Id.*

51 Smith v. Wade, 461 U.S. 30, 56 (1983).

52 Schwartz, *supra* note 46, at 917–18.

government attorneys used evidence about officers' limited financial resources in efforts to reduce punitive damages awards after trial—arguments that suggested officers would be personally responsible for satisfying those awards—only to indemnify the officers after courts entered final judgments in the cases.[53] And on the rare occasions that officers did contribute to settlements or judgments, their contributions were modest: no officer paid more than $25,000, and the median contribution by an officer was $2250.[54] No more than five of the forty-four largest jurisdictions in my study required officers to contribute anything during the six-year study period, and none of the thirty-seven smaller jurisdictions in my study required officers to do so.[55] In the vast majority of jurisdictions, "officers are more likely to be struck by lightning" than to contribute to a settlement or judgment over the course of their career.[56]

Although officers virtually never contribute to settlements and judgments, different mechanisms protect officers from financial liability around the country. Some jurisdictions must indemnify officers for actions taken in the course and scope of their employment as a matter of law.[57] Some jurisdictions can indemnify officers, but are not required to do so.[58] And some jurisdictions prohibit indemnification of officers under any circumstance.[59] Yet these policy variations do not lead to variation in outcome—regardless of the underlying policies, officers virtually never pay.[60] Cities and counties follow state laws requiring indemnification when they exist. When indemnification is discretionary, cities and counties virtually always decide to indemnify officers. And when cities and counties prohibit indemnification, some government officials view that prohibition as relevant only to the satisfaction of judgments and agree to pay settlements to resolve claims against their officers.[61] Other jurisdictions appear to indemnify their officers in violation of governing law.[62]

Even on the rare occasions that governments refuse to indemnify their officers, officers virtually never end up paying anything from their own pockets for a variety of reasons. When a city declines to indemnify an officer, the plaintiff may proceed against the municipality instead.[63] Some plaintiffs

53 *See id.* at 933–36.

54 *Id.* at 939.

55 *Id.* at 960.

56 *Id.* at 914.

57 *See id.* at 905 n.93.

58 *See id.* at 906 n.94.

59 *See id.* at 906 n.95.

60 *See id.* at 919.

61 *See id.*

62 *See id.* at 919–23.

63 I learned of one such example in interviews conducted for a related project. *See* Telephone Interview with E.D. Pa. Attorney A at 10 (on file with author) (describing a police shooting case in which the city of Philadelphia declined to indemnify the officer, and the attorney proceeded against the City: "[H]e's completely judgment proof. He can't even hold a job, he worked for a couple of months at Home Depot and he got fired. And,

decide not to try to collect judgments against officers who are not indemnified—presumably because the officers have limited personal assets.[64] Plaintiffs sometimes agree not to enforce their judgments against officers in exchange for post-trial settlements with the government.[65] Plaintiffs sometimes challenge the government's decision not to indemnify, but do not subsequently seek to collect against the officer if they are unsuccessful.[66] Other officers have successfully challenged their employers' decision not to indemnify; in these cases the plaintiffs were ultimately paid by the jurisdictions.[67] An officer denied indemnification may assign his right to challenge the city's decision to the plaintiff in exchange for an agreement not to enforce the judgment against the officer.[68] And in two recent cases, the City of Cleveland denied officers indemnification for multimillion-dollar verdicts, then hired bankruptcy attorneys for the officers to discharge the debts.[69] In each of these cases, officer defendants, their government employers, and plaintiffs have responded differently to government decisions not to indemnify. But the result in each of these cases was the same—the individual officers did not pay.

The Supreme Court has suggested, in another context, that qualified immunity is unnecessary to protect defendants who are otherwise insulated from financial liability. In *Richardson v. McKnight*, the Court denied private prison guards qualified immunity in part because, Justice Breyer wrote, private employment "increases the likelihood of employee indemnification and

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you know, I was left in a position where I had a pretty good case against him on the police shooting, but it would have been futile. I didn't want to take a verdict against him. I didn't want to take any damages against him. So . . . I'm proceeding against the municipality and we'll see how that goes.").

64 *See* Schwartz, *supra* note 46, at 929.

65 *See id.* at 921–22. I recently interviewed an attorney who described a case in which this type of negotiation occurred after trial. *See* Telephone Interview with N.D. Ohio Attorney C at 8 (on file with author) (describing a case in which the jury awarded $200,000 in compensatory damages and $450,000 in punitive damages against an officer; the city said that it would not indemnify the officer's punitive damages award; the defendants appealed the verdict; and the parties agreed to settle the case for $200,000 plus attorneys' fees, paid for by the city, in exchange for the defendants' agreement to withdraw the appeal).

66 *See* Schwartz, *supra* note 46, at 931. I recently interviewed an attorney who reported that, after he won a jury verdict against a Philadelphia police officer and the city declined to indemnify the officer, the attorney represented the police officer in a case against the city, seeking indemnification. *See* Telephone Interview with E.D. Pa. Attorney D at 8 (on file with author). The attorney lost in the state appellate court. *See id.*

67 *See* Schwartz, *supra* note 46, at 930–31.

68 *See id.* at 929.

69 *See* Radley Balko, *Cleveland's Vile, Embarrassing Scheme to Avoid Paying Victims of Police Abuse*, WASH. POST (Jan. 20, 2016), https://www.washingtonpost.com/news/the-watch/wp/2016/01/20/clevelands-vile-embarrassing-scheme-to-avoid-paying-victims-of-police-abuse/?utm_term=.a874f9fc1c31; Kyle Swenson, *How Cleveland's Trying to Get Out of Paying $18.7 Million in Judgments Against Two Cleveland Police Officers*, CLEVELAND SCENE (Jan. 13, 2016), https://www.clevescene.com/cleveland/how-clevelands-trying-to-get-out-of-paying-187-million-in-judgments-against-two-cleveland-police-officers/Content?oid=4692049.

to that extent reduces the employment-discouraging fear of unwarranted liability potential applicants face."[70] Likewise, the Court in *Owen v. City of Independence* held that municipalities are not entitled to qualified immunity in part because concerns about the "injustice . . . of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion" are "simply not implicated when the damages award comes not from the official's pocket, but from the public treasury."[71]

State and local law enforcement officers are as insulated from the threat of financial liability as are private prison guards, and as are individual officers in claims against the government. There should be no concerns about the injustice of subjecting state and local law enforcement officers to financial liability because the money to satisfy those awards comes from the public treasury. To the extent that Justice Breyer (who authored *Richardson*) or any other Justice views qualified immunity as a doctrine justified by the need to shield government officials from the threat of financial liability,[72] evidence that law enforcement officers virtually never contribute anything to settlements and judgments entered against them demonstrates that qualified immunity does not—and need not—serve this policy goal. And there is no evidence to suggest that other types of government officials face financial liability more frequently.

B. Qualified Immunity Does Not Shield Officers from Burdens of Litigation in Filed Cases

The Court has also justified qualified immunity as a protection from the burdens of discovery and trial in "insubstantial" cases.[73] In *Harlow*, the Court explained that the resolution of constitutional clams "may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues," and that "[i]nquiries of this kind can be peculiarly disruptive of effective government."[74] The Court appears to have become increasingly committed to this justification for qualified immunity doctrine. In 1992, the Court wrote that "the risk of 'distraction' alone cannot be sufficient grounds for an immunity."[75] But, by 2009, the Court reversed course, explaining that "the 'driving force' behind creation of the qualified immu-

70 Richardson v. McKnight, 521 U.S. 399, 411 (1997).

71 Owen v. City of Independence, 445 U.S. 622, 654 (1980).

72 It is unclear how strongly Justices currently on the Court hold this view. In *Sheehan*, Justice Alito's decision for the Court noted in passing that the likelihood that the officer defendants in the case would be indemnified was irrelevant to their qualified immunity analysis. *See* City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015) ("Whatever contractual obligations San Francisco may (or may not) have to represent and indemnify the officers are not our concern. At a minimum, these officers have a personal interest in the correctness of the judgment below, which holds that they may have violated the Constitution.").

73 Harlow v. Fitzgerald, 457 U.S. 800, 815–17 (1982).

74 *Id.* at 817.

75 *Richardson*, 521 U.S. at 411.

nity doctrine was a desire to ensure that '"insubstantial claims" against government officials [will] be resolved prior to discovery.'"[76]

If the "driving force" behind qualified immunity is to resolve insubstantial claims before discovery, the doctrine is utterly miserable at achieving its goal. In a prior study, I reviewed the dockets of 1183 Section 1983 lawsuits filed against law enforcement officers and agencies over a two-year period in five federal districts.[77] I found that just seven of these 1183 cases (0.6%) were dismissed on qualified immunity grounds before discovery.[78] Qualified immunity is little better at shielding government officials from trial—just thirty-eight (3.2%) of the 1183 cases in my dataset were dismissed before trial on qualified immunity grounds.[79] Although I do not know how many of these 1183 cases the Court would consider "insubstantial,"[80] the Court has explained that it intends qualified immunity to protect "all but the plainly incompetent or those who knowingly violate the law."[81] Unless the vast majority of law enforcement officer defendants are "plainly incompetent" or "knowingly violate the law," the doctrine is not functioning as expected in filed cases.[82]

My data suggest that qualified immunity screens out so few filed cases before discovery and trial because it is, in many ways, poorly designed to achieve its goal. First, qualified immunity cannot be raised by municipalities, and cannot be raised by government defendants in cases seeking solely equitable relief. In my study, ninety-nine (8.4%) of the 1183 Section 1983 cases filed against law enforcement fell into one or both of these categories.[83] Second, courts should reject qualified immunity arguments in motions to dismiss so long as the plaintiff has alleged a plausible claim for relief, and should reject qualified immunity arguments in summary judgment motions

76 Pearson v. Callahan, 555 U.S. 223, 231 (2009) (alteration in original) (quoting Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987); *see also* Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009) ("The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" (quoting Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment))).

77 For additional information about the districts and my methodology, see Schwartz, *supra* note 40, at 19–25.

78 *Id.* at 60.

79 *See id.*

80 Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

81 Malley v. Briggs, 475 U.S. 335, 341 (1986).

82 *Id.*

83 *See* Schwartz, *supra* note 40, at 27. Some might wonder whether these filing practices are evidence that qualified immunity encourages cases seeking institutional and forward-looking remedies. This may be true to some extent—fifty-four of these ninety-nine cases were filed by attorneys, and the unavailability of qualified immunity for these claims might have influenced their filing decisions. (The other forty-five cases were filed by pro se litigants who were unlikely to know about these intricacies of qualified immunity doctrine.) Some might view the encouragement of institutional and forward-looking remedies to be a positive side effect of qualified immunity doctrine. Note, however, that none of these ninety-nine cases resulted in a court decision finding a constitutional violation or an award of injunctive or declaratory relief.

so long as the plaintiff has created a factual dispute about whether the officer violated her clearly established rights.[84] District courts in my dataset wrote multiple opinions making clear that they understood qualified immunity was intended to resolve cases before discovery and trial, but denying the motions because the plaintiffs had met their burdens.[85] Third, even when courts grant defendants' qualified immunity motions, the grants will not be dispositive so long as additional claims or defendants remain in the cases. In my study, courts granted fifty-three qualified immunity motions in full, but only thirty-four (64.2%) grants were dispositive; in the others, additional claims or parties continued to expose government officials to the possible burdens of discovery and trial.[86] For each of these reasons, qualified immunity is ill-suited to play the role the Court expects it to play in the resolution of constitutional claims.

My findings also suggest that qualified immunity doctrine plays a limited role in the disposition of constitutional claims against law enforcement because there are so many other ways in which suits can be dismissed before discovery and trial. Courts dismissed 126 (10.7%) of the cases in my dataset before defendants responded because the plaintiffs filed frivolous claims, failed to serve defendants, or failed to prosecute their cases.[87] Even when defendants could raise qualified immunity, they often chose not to do so. Defendants moved to dismiss on qualified immunity grounds in just 13.9% of the cases in which they could raise the defense.[88] In two-thirds of their motions to dismiss, defendants did not include a qualified immunity argument.[89] Qualified immunity played a similarly limited role in district courts' decisions. When defendants raised qualified immunity in their motions to dismiss and courts granted those motions, courts three times more often granted the motions on grounds other than qualified immunity.[90] Defendants were more likely to raise qualified immunity at summary judgment, courts were more likely to grant defendants' summary judgment motions on qualified immunity grounds, and these summary judgment grants were more often dispositive.[91] Yet, even when defendants raised qualified immunity in their summary judgment motions, courts more often than not granted those motions on other grounds.[92]

Decades ago, Justice Kennedy recognized that the Supreme Court's qualified immunity jurisprudence duplicates other procedural barriers the Court has erected. In *Harlow v. Fitzgerald*, the Supreme Court eliminated consideration of officers' subjective intent to facilitate resolution of qualified

84 *See* Schwartz, *supra* note 40, at 55–56.
85 *See id.* at 54–55.
86 *Id.* at 44.
87 *Id.* at 56.
88 *Id.* at 31.
89 *See id.* at 34.
90 *See id.* at 39.
91 *See id.* at 48–49.
92 *See id.* at 39.

immunity motions at summary judgment.[93] Four years after *Harlow*, the Supreme Court issued three decisions that clarified and heightened the standard for defeating summary judgment.[94] And six years after that, Justice Kennedy observed, in *Wyatt v. Cole*, that those summary judgment decisions might have obviated the need for *Harlow*.[95] My research confirms Justice Kennedy's view. District courts' decisions suggest that the Court's summary judgment standards—not to mention its standards for pleadings and for constitutional violations—largely obviate the need for qualified immunity doctrine to screen out cases before trial.

Further research can explore the role that qualified immunity plays in the litigation of constitutional claims against other types of government officials. But all available evidence indicates that qualified immunity does little to shield government officials from discovery and trial in filed cases, and that the doctrine is both ill-suited and unnecessary to play its intended role.

C. Qualified Immunity Does Not Protect Against Overdeterrence

The only remaining justification that the Supreme Court has offered for qualified immunity is that it protects against overdeterrence. The Court fears that damages actions may "deter[ ] . . . able citizens from acceptance of public office" and "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties," and expects that qualified immunity will protect against these ills.[96] Yet there are three reasons to believe that qualified immunity does not actually serve as a shield against overdeterrence.

First, available evidence offers little support for the Supreme Court's concern that the threat of litigation "dampen[s] the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."[97] Multiple studies have found that law enforcement officers infrequently think about the threat of being sued when performing their jobs.[98] Notably, many of these same studies found that a substantial

93 Harlow v. Fitzgerald, 457 U.S. 800 (1982).

94 *See* Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

95 Wyatt v. Cole, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring) (declining to decide "whether or not it was appropriate for the Court in *Harlow* to depart from history in the name of public policy," but concluding that he "would not extend that approach to other contexts" because, although "*Harlow* was decided at a time when the standards applicable to summary judgment made it difficult for a defendant to secure summary judgment regarding a factual question such as subjective intent" "subsequent clarifications to summary-judgment law have alleviated that problem").

96 *Harlow*, 457 U.S. at 814 (second alteration in original) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

97 *Id.* (citation omitted).

98 *See* VICTOR E. KAPPELER, CRITICAL ISSUES IN POLICE CIVIL LIABILITY 7 (4th ed. 2006) (concluding, based on several studies, that "the prospect of civil liability has a deterrent effect in the abstract study environment but that it does not have a major impact on field

percentage of officers believe lawsuits deter unlawful behavior[99] and believe that officers should be subject to civil liability.[100] Taken together, these find-

practices"); Arthur H. Garrison, *Law Enforcement Civil Liability Under Federal Law and Attitudes on Civil Liability: A Survey of University, Municipal and State Police Officers*, 18 POLICE STUD. INT'L REV. POLICE DEV. 19, 26 (1995) (finding that 87% of state police officers, 95% of municipal police officers, and 100% of university police officers surveyed did not consider the threat of a lawsuit among their "top ten thoughts" when stopping a vehicle or engaging in a personal interaction); Daniel E. Hall et al., *Suing Cops and Corrections Officers: Officer Attitudes and Experiences About Civil Liability*, 26 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 529, 542 (2003) (surveying sheriff's deputies, corrections officers, and municipal police officers in a southern state and finding that 62 percent of respondents "either disagreed or strongly disagreed that the threat of civil liability hinders their ability to perform their duties," but that "46 percent of the respondents indicated that the threat of civil liability was among the top ten thoughts they had when performing emergency duties"); Tom "Tad" Hughes, *Police Officers and Civil Liability: "The Ties that Bind"?*, 24 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 240, 256 (2001) (reporting that a survey of Cincinnati police officers revealed that "78.2 percent of officers disagree or strongly disagree that they consider the potential for being sued when they stop a citizen"); Eric G. Lambert et al., *Litigation Views Among Jail Staff: An Exploratory and Descriptive Study*, 28 CRIM. JUST. REV. 70, 79, 81 (2003) (reporting that when corrections officers were asked whether civil liability "influenced their decision making when performing emergency duties, 28 percent said that it did, 63 percent said that it did not, and 9 percent were unsure," and that "[m]ore than 70 percent of the respondents indicated that civil lawsuits did not hinder their ability to do their jobs"); Kenneth J. Novak et al., *Strange Bedfellows: Civil Liability and Aggressive Policing*, 26 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 352, 360, 363 (2003) (finding that officers "tended to disagree" with the statement: "when I stop a citizen one of the first things that goes through my mind is the potential for being sued," but that "22 percent agreed or strongly agreed that they were cognizant of the potential for being sued during encounters with citizens"). Note that another study found that a higher percentage of police chiefs were influenced by the threat of litigation when making decisions affecting the public. *See* Michael S. Vaughn et al., *Assessing Legal Liabilities in Law Enforcement: Police Chiefs' Views*, 47 CRIME & DELINQUENCY 3 (2001).

99 *See* Garrison, *supra* note 98 (finding that 62% of a sample of fifty officers from state, municipal, and university law enforcement agencies in Pennsylvania agreed with the statement "[t]he police officer who knows he can be sued for violating an individual's civil rights is deterred from violating an individual's civil rights"); Hall et al., *supra* note 98, at 541 (finding that 48% of respondents "either agreed or strongly agreed that the threat of civil liability deters misconduct among criminal justice employees"); Hughes, *supra* note 98 (finding that 38% of officers believe the threat of liability deters civil rights violations); Lambert et al., *supra* note 98, at 80 (reporting that 50% of officers surveyed agreed or strongly agreed with the statement "[t]he threat of a civil suit deters negligent and unlawful behavior by public safety officials," and just 14% agreed or strongly agreed with the statement "[t]he threat of a civil suit hinders my ability to perform my duties").

100 *See, e.g.*, Garrison, *supra* note 98, at 25 (reporting that 52% of officers surveyed disagreed with the statement: "police officers should not be subject to civil suits by citizens"); Hall et al., *supra* note 98, at 538 (finding that 62% of officers surveyed "agreed or strongly agreed that officers should be personally subject to civil liability for violating the civil rights of citizens," and that "72 percent agreed or strongly agreed that officers should be personally liable for their negligence"); Hughes, *supra* note 98, at 254 (finding 57.2% of officers surveyed disagreed or strongly disagreed with the statement: "police officers should not be subject to civil suits by citizens"); Lambert et al., *supra* note 98, at 79 (finding

ings suggest that many officers believe lawsuits deter misbehavior by other officers, but do not themselves think about the threat of civil liability when performing their duties.

Second, to the extent that people are deterred from becoming police officers and officers are deterred from vigorously enforcing the law, available evidence suggests the threat of civil liability is not the cause. Instead, departments' difficulty recruiting officers has been attributed to high-profile shootings, negative publicity about the police, strained relationships with communities of color, tight budgets, low unemployment rates, and the reduction of retirement benefits.[101] Similarly, a recent survey found that a majority of officers believe recent high-profile shootings of Black men—not civil suits or the threat of liability—have made their job harder and discouraged them from stopping and questioning people they consider suspicious.[102]

Finally, assuming for the sake of argument that the threat of liability deters officers, it is far from clear that qualified immunity could mitigate those deterrent effects. Presumably, the Court expects that the threat of financial sanctions and the burdens associated with participating in discovery and trial discourage people from applying for government positions or chill officer behavior on the job. And presumably the Court believes that qualified immunity limits those negative effects of lawsuits by shielding government officials from financial liability and the burdens of litigation. But I have shown that indemnification practices and litigation dynamics already shield government officials from financial sanctions, obviating the need for qualified immunity to serve that role. I have also shown that qualified immunity

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"[a]lmost 59 percent [of jail staff surveyed] believed that public safety officers should be subject to civil suits for violating the rights of citizens"); Novak et al., *supra* note 98, at 364 (finding that "[t]he preponderance of officers disagreed with the statement that 'officers should not be subject to civil suits by citizens'"); Vaughn et al., *supra* note 98 (finding that 92% of police chiefs surveyed believed officers should be subject to civil suits).

101 *See, e.g.*, Yamiche Alcindor & Nick Penzenstadler, *Police Redouble Efforts to Recruit Diverse Officers*, USA TODAY (Jan. 21, 2015), http://www.usatoday.com/story/news/2015/01/21/police-redoubling-efforts-to-recruit-diverse-officers/21574081 (describing "tight budgets and strained relationships with communities of color" as the reasons police departments have struggled to meet their goals of diversifying their police departments); Daniel Denvir, *Who Wants to Be a Police Officer?*, CITYLAB (Apr. 21, 2015), http://www.citylab.com/crime/2015/04/who-wants-to-be-a-police-officer/391017 (reporting Chuck Wexler, the executive director of the Police Executive Research Forum, as saying: "[A]ll of the negative images of the police have made it more difficult to hire and recruit candidates into this profession"); Oliver Yates Libaw, *Police Face Severe Shortage of Recruits*, ABC NEWS (July 10, 2016), http://abcnews.go.com/US/story?id=96570 (attributing the low rate of police applicants to low unemployment, relatively low law enforcement salaries, and rigorous physical and psychological tests and other prerequisites for law enforcement jobs); William J. Woska, *Police Officer Recruitment—A Decade Later*, POLICE CHIEF MAG. (Apr. 2016), http://www.policechiefmagazine.org/police-officer-recruitment/ (describing a number of challenges of officer recruitment, including bad publicity, community anger, job competition from the technology sector, the recession, and the reduction in law enforcement retirement benefits).

102 RICH MORIN ET AL., PEW RESEARCH CENTER, BEHIND THE BADGE 15 (2017).

does little to shield government officials from discovery and trial in filed cases. If the burdens of discovery and trial do in fact discourage potential job applicants and chill officers' behavior, qualified immunity doctrine can do little in practice to counteract these effects.

There would likely be disagreement among the Justices—and there would certainly be disagreement among the public—about what would constitute optimal deterrence of law enforcement officers. But regardless of how "unflinching" one believes an officer should be in the "discharge of their duties,"[103] the threat of being sued appears to play little role in the decisions of job applicants and officers on the street. And qualified immunity doctrine could do little to mitigate whatever concerns about liability do exist.

III. Qualified Immunity Renders the Constitution Hollow

The Supreme Court might alternatively decide to eliminate or limit qualified immunity doctrine because, in Justice Sotomayor's words, it "renders the protections" of the Constitution "hollow."[104] Although Justice Sotomayor raised this concern regarding one case in particular, *Mullenix v. Luna*, it is a concern that could well be raised about the Court's qualified immunity jurisprudence more generally. Although qualified immunity is the reason few Section 1983 cases against law enforcement are dismissed, the Court's qualified immunity decisions have nevertheless made it increasingly difficult for plaintiffs to show that defendants have violated clearly established law, and increasingly easy for courts to avoid defining the contours of constitutional rights.

When qualified immunity was first announced by the Supreme Court in 1967, it was described as a good faith defense from liability. For the next fifteen years, defendants seeking immunity were required to show both that their conduct was objectively reasonable and that they had a "good faith" belief that their conduct was proper.[105] But, in 1982, the Court eliminated the subjective prong of the defense, entitling a defendant to qualified immunity so long as he did not violate "law [that] was clearly established at the time an action occurred."[106]

The Court's definition of "clearly established" law has narrowed significantly over the past thirty-five years. Although the Court once held that a plaintiff could defeat qualified immunity by showing an obvious constitutional violation,[107] the Court's subsequent decisions have required that plaintiffs point to "controlling authority in their jurisdiction" or a "consensus of cases of persuasive authority."[108] In its most recent decisions, the Court has only been willing to assume arguendo that circuit precedent or a consensus

103 Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (citation omitted).
104 Mullenix v. Luna, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting).
105 *See Harlow*, 457 U.S. at 815–16.
106 *Id.* at 818.
107 *See* Hope v. Pelzer, 536 U.S. 730 (2002).
108 Wilson v. Layne, 526 U.S. 603, 617 (1999).

of cases can clearly establish the law—suggesting that Supreme Court precedent is the only surefire way to clearly establish the law.[109]

Moreover, the Supreme Court's qualified immunity decisions require that the prior precedent clearly establishing the law have facts exceedingly similar to those in the instant case. Although the Court has repeatedly assured plaintiffs that it "'do[es] not require a case directly on point' for a right to be clearly established," it has also repeatedly cautioned that "'clearly established law' should not be defined 'at a high level of generality.'"[110] Indeed, the Court has stated—and regularly restated—that government officials violate clearly established law only when "'[t]he contours of [a] right [are] sufficiently clear' that *every* 'reasonable official would [have understood] that what he is doing violates that right.'"[111] In recent years, the Court has reversed several lower court denials of qualified immunity because the lower court "misunderstood the 'clearly established' analysis" and "failed to identify a case where an officer acting under similar circumstances as [the defendant] was held to have violated the Fourth Amendment."[112]

The challenge of identifying clearly established law is heightened further by the Court's decision in *Pearson v. Callahan*, which allows courts to grant qualified immunity without ruling on the underlying constitutional violation.[113] Courts considering qualified immunity motions are faced with two questions—whether a defendant has violated the Constitution, and whether the constitutional right was clearly established. In 2001, the Supreme Court instructed lower courts deciding qualified immunity motions to answer both questions: The Court reasoned that requiring lower courts to rule on the constitutionality of a defendant's behavior would allow "the law's elaboration from case to case . . . . The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case."[114] In 2009, in *Pearson v. Callahan*, the Court reversed itself and held that lower courts could grant qualified immunity without first ruling on the constitutionality of a defendant's behavior.[115]

Taken together, the Court's qualified immunity decisions have created a vicious cycle. The Supreme Court has instructed lower courts that they must

109 *See* Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 70–71 (2016) (describing this shift in the Supreme Court's qualified immunity decisions in recent years).

110 White v. Pauly, 137 S. Ct. 548, 551–52 (2017) (alteration in original) (first quoting Mullenix v. Luna, 136 S. Ct. 306, 308 (2015); and then quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011)).

111 *Ashcroft*, 563 U.S. at 741 (alteration in original) (emphasis added) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

112 *White*, 137 S. Ct. at 552; *see also supra* notes 2–3 and accompanying text (describing the frequency with which the Supreme Court grants certiorari and reverses qualified immunity denials and the Court's criticisms of these lower court opinions).

113 Pearson v. Callahan, 555 U.S. 223 (2009).

114 Saucier v. Katz, 533 U.S. 194, 201 (2001).

115 *Pearson*, 555 U.S. at 223–24.

grant qualified immunity unless they can find a prior Supreme Court decision, binding precedent, or consensus of cases in which "an officer acting under similar circumstances"[116] has been found to have violated the Constitution. Yet the Court has also advised lower courts that they can grant qualified immunity without ruling on plaintiffs' underlying constitutional claims—reducing the frequency with which lower courts announce clearly established law.[117] And the Supreme Court is among the worst offenders on this score; although the Supreme Court has suggested in recent decisions that it may be the only body that can clearly establish the law for qualified immunity purposes,[118] it repeatedly grants qualified immunity without ruling on the underlying constitutional claim.[119] This precise illogic is on full display in *Mullenix v. Luna*, the Supreme Court decision that provoked Justice Sotomayor's expression of concern about the damage qualified immunity does to the Constitution.

In *Mullenix*, the Supreme Court reversed the Fifth Circuit and held that qualified immunity protected Texas Department of Public Safety Officer Mullenix from liability for killing Israel Leija, Jr., as he was fleeing arrest for violating misdemeanor probation.[120] Officer Mullenix "fired six rounds in the dark at a car traveling 85 miles per hour . . . without any training in that tactic, against the wait order of his superior officer, and less than a second before the car hit spike strips deployed to stop it."[121] Mullenix's first words to his supervisor after the shooting were, "How's that for proactive?"—apparently referring to an earlier conversation in which the supervisor "suggested that [Mullenix] was not enterprising enough."[122] The district court denied Mullenix's summary judgment motion based on qualified immunity and the Fifth Circuit affirmed. But, in a per curiam opinion, the Supreme Court held that the trooper did not violate clearly established law.

In reaching this conclusion, the Court reviewed three of its prior decisions involving law enforcement officers who shot fleeing suspects,[123] one of which granted the officer qualified immunity without ruling on the underlying constitutional claim.[124] The Court then described these cases as creating a "hazy legal backdrop against which Mullenix acted."[125] Finally, the Court

116 *White*, 137 S. Ct. at 552.

117 *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 37 (2015) (comparing several studies that examine qualified immunity decisions before and after *Saucier* and *Pearson*, and finding that courts after *Pearson* decide constitutional questions less frequently and are also less likely to find constitutional violations when granting qualified immunity).

118 *See supra* note 109 and accompanying text.

119 *See* Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887 (2018) (describing several of these cases).

120 Mullenix v. Luna, 136 S. Ct. 305, 312 (2015) (per curiam).

121 *Id.* at 313 (Sotomayor, J., dissenting).

122 *Id.* at 316 (Sotomayor, J., dissenting).

123 *Id.* at 309–11 (opinion of the Court).

124 *See* Brosseau v. Haugen, 543 U.S. 194, 198 (2004).

125 *Mullenix*, 136 S. Ct. at 309.

relied on this uncertainty to grant qualified immunity, but did not decide whether Mullenix violated the Constitution—and so did not clear the haze. Mullenix's remark to his supervisor played no role in the analysis, as "an officer's actual intentions are irrelevant" to the qualified immunity analysis.[126] Justice Sotomayor, dissenting, wrote that the Court's decision "sanction[s] a 'shoot first, think later' approach to policing" and thereby "renders the protections of the Fourth Amendment hollow."[127]

Concerns that the Court's qualified immunity jurisprudence renders the Constitution hollow are even more acute for constitutional claims involving new technologies and techniques. Despite the Court's discussion of the "hazy legal backdrop" in *Mullenix*, there are decades of decisions analyzing when shooting a fleeing suspect constitutes excessive force.[128] There are comparatively fewer cases assessing the constitutional rights of citizens to record the police or defining when Taser use constitutes excessive force.[129] By narrowly defining "clearly established law" and allowing courts to grant qualified immunity without ruling on the underlying constitutional claim, the Supreme Court leaves important questions about the scope of constitutional rights "needlessly floundering in the lower courts," as Karen Blum has written, possibly never to be clarified.[130] And even when there is some clarifi-

126 *Id.* at 316 (Sotomayor, J., dissenting). Justice Ginsburg recently raised concerns about the failure to consider evidence of officer intent in another setting—probable cause determinations. The failure to do so, she wrote, "sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection." District of Columbia v. Wesby, 138 S. Ct. 577, 594 (2018) (Ginsburg, J., concurring in the judgment in part).

127 *Mullenix*, 136 S. Ct. at 316 (Sotomayor, J., dissenting). Justice Sotomayor, joined by Justice Ginsburg, raised similar concerns in her dissent in *Kisela v. Hughes*, 138 S. Ct. 1148 (2018). In that case, Officer Kisela shot the plaintiff when she was holding a kitchen knife by her side and speaking with her roommate in a "composed and content" manner. *Id.* at 1155. Two other officers on the scene held their fire, but Kisela shot Hughes four times without a prior warning. *Id.* Justice Sotomayor found that Kisela violated the Fourth Amendment and that prior precedent clearly established the unconstitutionality of his conduct. *Id.* at 1157–58, 1161. She further wrote that the Court's trend of summarily reversing denials of qualified immunity "transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment," and that the Court's decision in *Kisela* "sends an alarming signal to law enforcement officers . . . that they can shoot first and think later." *Id.* at 1162.

128 *See, e.g.*, *Mullenix*, 136 S. Ct. at 309–11 (describing some of these cases).

129 For discussions of the doctrinal confusion in these areas, see Matthew Slaughter, *First Amendment Right to Record Police: When Clearly Established Law Is Not Clear Enough*, 49 J. MARSHALL L. REV. 101 (2015); Bailey Jennifer Woolfstead, *Don't Tase Me Bro: A Lack of Jurisdictional Consensus Across Circuit Lines*, 29 T.M. COOLEY L. REV. 285 (2012).

130 Blum, *supra* note 119, at 1895. Blum describes the slow road to constitutional clarity in the circuits regarding the existence of a First Amendment right to record the police. *Id.* But there are still five circuits by Blum's count that have not announced such a right. And new technologies may create even more complex constitutional questions than those involved in recording the police. *See, e.g.*, Woolfstead, *supra* note 129 (describing lack of agreement among courts about what level of force Tasers constitute and the differences between using Tasers in "dart mode" and "drive-stun" mode).

cation about the existence and scope of novel constitutional rights, qualified immunity may still be granted if the facts of those prior cases are not sufficiently similar to the case at hand.

The Supreme Court has described qualified immunity doctrine as balancing "two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[131] By simultaneously allowing courts to decide qualified immunity motions without reaching the underlying constitutional questions and requiring plaintiffs to produce circuit or Supreme Court opinions finding constitutional violations in cases with nearly identical facts, and by ignoring available evidence of officers' culpable intent, the Court perpetuates uncertainty about the contours of the Constitution and sends the message to officers that they may be shielded from damages liability even when they act in bad faith.

These criticisms of qualified immunity may appear to sit in some tension with my finding that filed cases are rarely dismissed on qualified immunity grounds. If qualified immunity is the reason that less than four percent of filed cases are dismissed, can it render the protections of the Constitution hollow? Unfortunately, the answer is yes. Qualified immunity doctrine imperils government accountability in several ways, even as it is the reason few cases are dismissed. First, as Justice Sotomayor has explained in *Mullenix* and *Kisela v. Hughes*, the Supreme Court's flurry of recent decisions granting qualified immunity—even to officers who have acted unreasonably or in bad faith—suggest to officers that they can act with impunity.[132] As Justice Sotomayor has written, an opinion like *Kisela* "tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished."[133] The Supreme Court's decisions can send this message to police and the public regardless of how many decisions are dismissed on qualified immunity grounds in the lower courts.

Second, qualified immunity doctrine may discourage people from bringing cases when their constitutional rights are violated.[134] The Supreme Court's decisions send the message to plaintiffs' attorneys that even Section 1983 cases with egregious facts run the risk of dismissal on qualified immunity grounds, and encourage defense counsel to raise qualified immunity at every turn and immediately appeal district court decisions denying their motions.[135] These dynamics likely increase the cost, complexity, and delay associated with litigating Section 1983 cases, and these increased risks and costs may discourage attorneys from taking cases involving novel constitu-

131 Pearson v. Callahan, 555 U.S. 223, 231 (2009).

132 *See supra* note 127 and accompanying text (describing Justice Sotomayor's concerns).

133 Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

134 For discussion of this possibility, as well as the possibility that qualified immunity doctrine causes plaintiffs not to file insubstantial cases, see *infra* Section IV.C.

135 For further discussion of this possibility, see *id.* *See also* Schwartz, *supra* note 40.

tional claims and cases that involve clear constitutional violations but low damages.[136] Qualified immunity can play this role in constitutional litigation while still being the reason few filed cases are dismissed.

Third, decisions allowing courts to grant qualified immunity without ruling on the underlying constitutional claims may compromise police departments' policies and trainings. Many law enforcement agencies' policies and trainings hew closely to Supreme Court and circuit decisions.[137] When the Supreme Court and circuit courts issue opinions announcing new constitutional rights—or clarifying that rights do not exist—law enforcement agencies modify their policies and trainings to conform to those opinions.[138] But when the Supreme Court suggests that only its decisions can clearly establish

136 *See infra* Section IV.C.

137 Ingrid Eagly and I have studied Lexipol LLC, a private company that provides standardized policies and trainings to 3000 law enforcement agencies in thirty-five states across the country, including 95% of all California law enforcement agencies. *See* Ingrid V. Eagly & Joanna C. Schwartz, *Lexipol: The Privatization of Police Policymaking*, 96 TEX. L. REV. 891 (2018). Each Lexipol policy is designated as based on "federal law," "state law," "best practices," or is "discretionary." Lexipol representatives warn their subscribers not to change those policies based on federal and state law. Jurisdictions understand this message—one deputy chief explained that policies designated as "best practices" or "discretionary" are viewed as "optional," but those that are the "law" are required. Of course, jurisdictions vary in the degree to which they rely on court decisions when crafting their policies and trainings, but we have found that the dominant private police policymaker relies heavily on court opinions. *See also infra* note 139.

138 *See, e.g.*, POLICE EXEC. RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 18 (2016) (explaining that after the Fourth Circuit held that using a Taser repeatedly in drive-stun mode was unconstitutional, "several agencies in jurisdictions covered by the Fourth Circuit ruling amended their use-of-force and ECW [Electronic Control Weapons] policies" in response to the decision); Lawrence Rosenthal, *Seven Theses in Grudging Defense of the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 525, 543 (2013) ("After the Court prohibited random stops of motorists to check their licenses and registration in *Delaware v. Prouse*, the District of Columbia Police Department almost immediately overhauled its policies to comply with the new ruling. More recently, after the Court held that the installation and subsequent use of a GPS device to monitor a vehicle's movements was a 'search' within the meaning of the Fourth Amendment in *United States v. Jones*, the FBI's general counsel reported that the decision caused the agency to turn off nearly 3,000 monitoring devices."); David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567 (2008) (observing that California law enforcement agencies stopped training their officers not to conduct warrantless searches of trash—a requirement of California constitutional law—after the United States Supreme Court rejected this prohibition); Charles D. Weisselberg, *In the Stationhouse After* Dickerson, 99 MICH. L. REV. 1121 (2001) (examining how California law enforcement agencies trained officers to comply with a Supreme Court decision reaffirming *Miranda*); Patrick Healy, *LAPD Commission Adds to Guidelines for Review of Police Use of Force*, NBC L.A. (Feb. 19, 2014), https://www.nbclosangeles.com/news/local/LAPD-Commission-Adds-to-Guidelines-for-Review-of-Police-Use-of-Force-246094151.html (reporting that a decision by the California Supreme Court that "tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability" caused the Los Angeles Police Commission to change the ways in which it evaluates whether force used by its officers was proper).

the law, and then repeatedly grants qualified immunity without ruling on the underlying constitutional questions, law enforcement agencies have little in the way of guidance about how to craft their policies.

For example, the Supreme Court has spent countless hours and an outsized portion of its docket in recent years deciding whether officers who use deadly force are entitled to qualified immunity, but these opinions offer virtually no guidance to law enforcement agencies about what constitutes excessive force. Indeed, the North Star for many departments' use of force policies is *Graham v. Connor*, a Supreme Court decision that is almost thirty years old and itself provides limited guidance to law enforcement agencies regarding what constitutes excessive force.[139]

If qualified immunity doctrine effectively shielded government officials from burdens associated with litigation in insubstantial cases, one might justify these impositions on government accountability as a necessary evil. But the Court's qualified immunity jurisprudence threatens to undermine government accountability in each of these ways without meaningfully achieving its goals of shielding government defendants from financial exposure and shielding officials from litigation burdens when they act reasonably. The failure of qualified immunity to achieve its intended policy goals makes its negative impact on government accountability indefensible.

IV. Alternative Defenses of Qualified Immunity Are Unpersuasive

The Supreme Court's qualified immunity doctrine is ungrounded in history, unnecessary or ill-suited to serve its intended policy goals, and counterproductive to interests in holding government wrongdoers responsible when they have violated the law. The Court has said that evidence undermining its justifications for qualified immunity would be reason to revisit the sensibility of the defense.[140] Yet the Justices might, instead, advance alternative justifications for qualified immunity. Commentators have offered three alternative rationales for qualified immunity that the Court might conceivably adopt.

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139 *See* Eagly & Schwartz, *supra* note 137; *see also* Graham v. Connor, 490 U.S. 386 (1989). Some progressive agencies are adopting policies and trainings that offer more specific guidance on use of force than does *Graham*, but the founder of Lexipol LLC, which writes police policies for 3000 agencies nationwide, argues that use of force policies should not go beyond the guidance offered by the Supreme Court in *Graham*, writing:

> Several years ago, our forefathers decided that there would be nine of the finest legal minds in the country who would interpret the law of the land. For almost 30 years, law enforcement has learned to function under the guidance of the Supreme Court's "objective reasonableness" standard. What would happen if each of the 18,000+ law enforcement agencies in the United States formulated their own standard "beyond" *Graham*?

Eagly & Schwartz, *supra* note 137, at 928 (quoting Bruce D. Praet, *National Consensus Policy on Use of Force Should Not Trigger Changes to Agency Policies*, Lexipol (Jan. 25, 2017), http://www.lexipol.com/news/use-caution-when-changing-use-of-force-policy-language/).

140 *See* Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987) (observing that evidence undermining its assumptions about constitutional litigation might "justify reconsideration of the balance struck" by its qualified immunity jurisprudence).

The first is that qualified immunity doctrine shields government budgets from excess liability and thereby encourages government officials to instruct their officers vigorously to enforce the law. The second is that qualified immunity encourages development of constitutional law because it allows courts to announce new constitutional rights without imposing damages liability on the officials whose conduct was at issue in the case. The third is that qualified immunity protects government defendants from insubstantial suits by discouraging attorneys from filing such cases. In this Part, I will explain why the Court would be ill-advised to adopt any of these rationales for qualified immunity.

A. Qualified Immunity Cannot Be Justified as a Protection for Government Budgets

Although individual officers virtually never personally satisfy settlements and judgments entered against them, qualified immunity has been described as a financial protection for local governments that indemnify their officers.[141] Government officials, concerned about the costs of damages awards, might encourage inaction by their officers to reduce liability costs.[142] If so, qualified immunity would arguably allow government officials to make decisions without undue concern about the financial impact of those decisions. In order for qualified immunity to be justified on these grounds, one must assume that government officials would encourage inaction by their employees in response to fears of financial liability, and that qualified immunity lessens those concerns and allows government officials instead to encourage vigorous enforcement of the law.

There are three reasons for skepticism about this rationale for qualified immunity. First, this rationale relies on unfounded assumptions about the flow of information about lawsuits within government bureaucracies. In order for lawsuit payouts to influence government officials' management of their officers, officials would need enough information about those lawsuits—including the officers named, the underlying facts, and the amount paid—to make policy and supervision decisions aimed at reducing the costs of those types of cases in the future. My research suggests that most law

141 *See, e.g.*, Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 856 (2007) (noting that widespread indemnification undermines "the stated justification for qualified immunity," but "[w]hen qualified immunity is viewed from the standpoint of a public employer—the party that bears the economic burden of liability—this doctrine has a compelling justification").

142 *See* John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 245–46 (2013) ("Civil-rights judgments and the accompanying awards of attorneys' fees are on-budget costs. At least for states and localities . . . increased on-budget costs mean higher taxes or cuts in other expenditures. The political penalties for either choice can be severe. There is this additional reason to think, therefore, that while erroneous government action and erroneous government inaction may be equally costly to society as a whole, the former is more likely to trigger on-budget liability and thus to affect and distort government behavior.").

enforcement agencies do not collect this type of information about lawsuits brought against their officers.[143] Indeed, in most departments, there appears to be minimal effort to track or analyze the nature of claims filed against their officers or the evidence generated during discovery in those cases.[144] Many large police departments do not even have ready access to information about the amount paid to satisfy settlements and judgments against them and their officers.[145]

The fact that most law enforcement agencies do not systematically gather and analyze information from damages actions brought against them does not mean that these suits can never impact policies and practices. Lawsuits that receive press coverage may capture the attention of police chiefs and other policy makers, and may inspire departments to institute changes to prevent future similar cases.[146] Information revealed during discovery and trial—particularly if it is disclosed to the public—can create political pressure on departments to take action.[147] Information generated during litigation can also be used to support future cases seeking systemic reform.[148] Plaintiffs sometimes negotiate settlements in damages actions that require reforms to police policies and trainings.[149] And police misconduct attorneys have told me that sustained litigation pressure on particular departments some-

143 *See generally* Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023 (2010).

144 *See id.*

145 *See* Schwartz, *supra* note 46, at 903 (reporting that fifty-eight of the seventy largest law enforcement agencies to which I submitted public records requests did not have information about payouts in lawsuits brought against their agencies and officers and so had to seek the information from other municipal departments).

146 *See* Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 844 (2012) (describing this possibility). For example, large litigation payouts and several high-profile shootings led the Los Angeles County Board of Supervisors to order an independent commission to review the Los Angeles County Sheriff's Department in 1992. *See* JAMES G. KOLTS ET AL., LOS ANGELES COUNTY SHERIFF'S DEPARTMENT 1 (1992) (reporting that the independent commission was prompted by "[a]n increase over the past years in the number of officer-involved shootings," "[f]our controversial shootings of minorities by LASD deputies in August 1991," and the fact that "Los Angeles County . . . paid $32 million in claims arising from the operations of the LASD over the past four years"). Twenty years later, another independent commission investigated the Los Angeles Sheriff's Department's handling of the L.A. County Jail, prompted in part, again, by high profile litigation against the Department. *See* REPORT OF THE CITIZENS' COMMISSION ON JAIL VIOLENCE 42, 185 (2012).

147 *See* Joanna C. Schwartz, *Introspection Through Litigation*, 90 NOTRE DAME L. REV. 1055, 1057 n.7 (2015) (describing studies showing lawsuits have revealed information that has advanced regulatory efforts in a number of areas).

148 For two examples of complaints that use prior lawsuits to demonstrate a pattern or practice of misconduct, see Amended Complaint and Demand for Jury Trial, An v. City of New York, 16-cv-05381 (S.D.N.Y. June 2, 2017); Third Amended Complaint for Damages, Starr v. County of Los Angeles, 08-cv-00508 (C.D. Cal. Oct. 10, 2008).

149 *See, e.g.*, Alphonse A. Gerhardstein, *Making a Buck While Making a Difference*, 21 MICH. J. RACE & L. 251, 254–57 (2016) (describing multiple cases that have led to reforms).

times yields positive results.[150] But if law enforcement agencies do not keep track of or analyze basic information about the lawsuits filed and resolved against their officers, they cannot make policy and supervision decisions informed by most cases brought against them.

Second, this rationale for qualified immunity assumes that, absent qualified immunity, governments and police departments would feel the costs of lawsuit payouts so acutely that officials would promote timidity on the part of their officers as a way to reduce lawsuit costs in the future. Yet lawsuit payouts have no financial consequences for the majority of large law enforcement agencies across the country. In a prior study, I gathered information about lawsuit budgeting and payment arrangements in sixty-two of the seventy jurisdictions with the largest law enforcement agencies and in jurisdictions with thirty-eight smaller agencies.[151] At least 60% of the largest agencies and 75% of the smaller self-insured agencies in my study feel no financial consequences when lawsuit costs increase and no financial benefits when lawsuit costs decline.[152] There may well be political pressures associated with these payouts.[153] But those political pressures will not reliably translate into policy and supervision decisions if the agency in question does not have enough information about trends in the lawsuits brought against it to know how to reduce those costs.

It is less certain what impact lawsuits have on the law enforcement agencies that do suffer some financial consequences of payouts. There are reasons to believe that payouts may influence policies and practices in these departments to some degree. But no officials I interviewed during the course of my study reported that their police department's financial responsibility for payouts negatively affected their policy or training decisions, or otherwise encouraged timidity.[154] In order to justify qualified immunity as a means of encouraging vigorous government decisionmaking, it would be necessary to show both that lawsuit payouts influence government policy and supervision decisions, and also that lawsuit payouts cause officials to make policy and supervision decisions that favor inaction. Available evidence offers no reason to believe that is the case.

A final reason for skepticism about this rationale for qualified immunity is that it relies on the assumption that qualified immunity doctrine signifi-

150 *See, e.g.*, Telephone Interview with N.D. Ohio Attorney D (on file with author) (reporting that his firm's litigation against the Cleveland Police Department caused the Department to issue a policy prohibiting officers from shooting at moving vehicles); Telephone Interview with M.D. Fla. Attorney G (on file with author) (describing reforms to the Florida jail system and the Jacksonville fire department resulting from litigation); Telephone Interview with E.D. Pa. Attorney G (on file with author) (describing political pressures resulting from a series of damages actions that contributed to a mayor's failure to get reelected).

151 *See generally* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. Rev. 1144, 1148 (2016).

152 *See id.* at 1203.

153 *See supra* note 146 and accompanying text.

154 *See* Schwartz, *supra* note 151, at 1201.

cantly reduces liability costs. My research makes clear that very few lawsuits are dismissed because of qualified immunity.[155] Moreover, qualified immunity may in fact increase the costs of litigating constitutional cases. In my docket dataset, defendants raised qualified immunity in 154 motions to dismiss—each of which needed to be briefed and argued by the parties. Seven (4.5%) of those motions resulted in the dismissal of plaintiffs' cases. In those seven cases, qualified immunity spared defendants money associated with further litigation—which might have included discovery, summary judgment, and trial. But the parties spent money briefing and arguing qualified immunity in the other 147 motions without a corresponding benefit. Defendants raised qualified immunity in 283 summary judgment motions, twenty-seven of which (9.5%) resulted in dismissal. In these twenty-seven cases, the litigation cost savings would have been modest—discovery was already complete, and the cost of summary judgment practice may in some instances exceed the cost of going to trial.[156] In the other 256 (90.5%) cases, the money and time spent to brief and argue qualified immunity did not spare the parties the costs of trial.

The costs of interlocutory appeals are even more difficult to justify. As Judge James Gwin of the Northern District of Ohio recently explained,

> In the typical case, allowing interlocutory appeals actually increases the burden and expense of litigation both for government officers and for plaintiffs . . . because an interlocutory appeal adds another round of substantive briefing for both parties, potentially oral argument before an appellate panel, and usually more than twelve months of delay while waiting for an appellate decision. All of this happens in place of a trial that (1) could have finished in less than a week, and (2) will often be conducted anyway after the interlocutory appeal.[157]

Given this evidence, there is no basis to conclude that qualified immunity reduces the costs of Section 1983 litigation, and reason to believe it actually increases costs in some cases.

Of course, qualified immunity grants may spare defendants not only the costs of litigation but also the costs of large settlements and jury verdicts. It is possible that there would have been significant payouts in the thirty-eight cases that were dismissed on qualified immunity grounds in my docket dataset.[158] But it is also possible that these cases would have been dismissed on other grounds at the motion to dismiss or summary judgment stages, or

155 *See* Schwartz, *supra* note 40, at 60.

156 *See id.* at 61 (observing that most trials in my dataset lasted just a few days); *see also* Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 100 (1997) (observing that, when considering the efficiencies of qualified immunity, "the costs eliminated by resolving the case prior to trial must be compared to the costs of trying the case" and "the pretrial litigation costs caused by the invoking of the immunity defense may cancel out the trial costs saved by that defense").

157 Wheatt v. City of East Cleveland, No. 1:17-CV-377, 2017 WL 6031816, at *4 (N.D. Ohio Dec. 6, 2017).

158 *See* Schwartz, *supra* note 40.

ended in defense verdicts.[159] Indeed, in the two districts in my study with the most qualified immunity dismissals—the Southern District of Texas and the Middle District of Florida—juries appear especially inhospitable to plaintiffs.[160] And even if these thirty-eight cases had resulted in large verdicts or settlements, those payments would have been spread across thirty-two different jurisdictions.[161]

Qualified immunity might also shift the dynamics of civil rights litigation in other ways that shield government coffers—the doctrine might discourage plaintiffs from filing some cases, encourage plaintiffs to settle cases they otherwise would have brought to trial, or reduce cases' settlement value.[162] But even if eliminating qualified immunity increased filings, caused more cases to go to trial, and increased settlement amounts to some degree, it does not follow that these shifts would so imperil government budgets that qualified immunity is necessary to safeguard robust government policymaking. Lawsuit payouts are a miniscule portion of most local government budgets and would remain so even if they increased significantly.[163] Of course, local governments are perpetually strapped for cash, and every dollar counts. But especially given the limited information agencies have about lawsuits brought against them and the limited impact of lawsuit payouts on most law enforcement agencies' budgets, the possibility that qualified immunity might shield local governments from some additional liability costs is insufficient reason to preserve the doctrine.

159 Seventy-seven cases in my study ended in jury verdicts; sixty-seven were defense verdicts, three were split verdicts, and seven were plaintiffs' verdicts. *See id.* at 46. There were another five cases that resulted in plaintiffs' verdicts or split verdicts but were settled after trial: In the Southern District of Texas there were two additional plaintiffs' verdicts; in the Middle District of Florida there was one additional plaintiff's verdict; in the Northern District of California there was one additional plaintiff's verdict; and in the Eastern District of Pennsylvania there was one additional split verdict. Accordingly, all in all, there were sixty-seven defense verdicts, four split verdicts, and eleven plaintiffs' verdicts.

160 Of the twenty-two cases that went to verdict in these two districts, just three were plaintiffs' verdicts.

161 Five qualified immunity dismissals in my dataset were in cases brought against the Houston Police Department, two were in cases brought against the San Francisco Police Department, and two were in cases brought against the Brevard Sheriff's Department. The remaining twenty-nine cases were brought against twenty-nine jurisdictions across the five districts.

162 *See* Schwartz, *supra* note 40; *see also infra* Section IV.C.

163 *See* Schwartz, *supra* note 151, at 1224–449 (finding that, among fifty-three of the largest local governments in the country, payments in lawsuits against law enforcement amounted to 0.15% of government budgets). Note, also, that lawsuits against law enforcement typically make up a significant portion of local government liability costs. *See id.* at 1161 n.58.

B. Qualified Immunity Cannot Be Justified as a Tool to Expand Constitutional Rights

Qualified immunity has long been defended on the ground that it encourages constitutional innovation by courts.[164] Qualified immunity doctrine allows a court to announce a new constitutional right (or expand the contours of an existing one), but shield the defendant in the case from damages liability. As a result, "[j]udges contemplating an affirmation of constitutional rights need not worry about the financial fallout."[165] In a world without qualified immunity, John Jeffries argues: "[E]very extension of constitutional rights, whether revolutionary or evolutionary, would trigger money damages. In some circumstances, that prospect might not matter. In others, it surely would. The impact of inhibiting constitutional innovation in this way is impossible to quantify, but I think it would prove deleterious."[166] Jeffries is right—it is impossible to quantify the impact eliminating qualified immunity would have on the development of constitutional rights. Even accepting that qualified immunity could be used by courts to spur constitutional innovation, though, this possible benefit should not save qualified immunity doctrine from the chopping block.

As a preliminary matter, qualified immunity does not currently appear to encourage very much in the way of constitutional innovation. To the extent courts use qualified immunity to shield government defendants from liability while expanding constitutional rights moving forward, they need to decide qualified immunity motions and appeals in a particular way—they must find a constitutional violation and then grant qualified immunity on the ground that the right was not clearly established.[167] But several studies of circuit court decisions show that qualified immunity motions are rarely

164 *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 99–100 (1999) ("Qualified immunity reduces government's incentives to avoid constitutional violations. At the same time, it allows courts to embrace innovation without the potentially paralyzing cost of full remediation for past practice."); *see also* Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 480 (2011) ("In the absence of official immunity, even some currently well-established constitutional rights and authorizations to sue to enforce them would likely *shrink*, and sometimes appropriately so.").

165 Jeffries, *supra* note 142, at 247.

166 *Id.* at 248. *See also* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 915 (1999) (If Section 1983 were expanded and qualified immunity were eliminated, "who could doubt that the effect would be a wholesale rewriting of constitutional rights? While it is impossible to predict just how various rights would be transfigured, drastically increasing the cost of rights would surely result in some curtailment.").

167 Although the Supreme Court once required lower courts to take both of these steps when deciding qualified immunity motions as a means of facilitating the development of constitutional law, it held in 2009 that lower courts can grant qualified immunity without ruling on the underlying constitutional claim. *See supra* notes 113–15 and accompanying text (discussing this shift).

decided in this manner.[168] The Supreme Court also seems uninterested in constitutional innovation through qualified immunity—since its 2009 decision in *Pearson*, it has found a constitutional violation but granted qualified immunity just two times.[169] Indeed, courts are far more likely to grant qualified immunity motions without ruling on the underlying constitutional claim—a practice that increases constitutional stagnation, not innovation.[170]

The fact that courts infrequently find constitutional violations but grant qualified immunity does not foreclose the possibility that they are dramatically innovating on the rare occasions that they do. But, in fact, these decisions offer little in the way of constitutional innovation. In their study of 844 circuit court qualified immunity opinions decided over a three-year period—encompassing 1460 separate claims—Aaron Nielson and Christopher Walker identified fifty-two claims in which circuit courts found one or more constitutional violations but granted qualified immunity.[171] Nielson and Walker kindly shared with me a list of the forty-three cases in which these claims were adjudicated. In an Appendix, I have listed these cases and their holdings.[172] I would characterize none as dramatically expanding the law. Four of the decisions did not develop the law at all: in these cases, the circuit courts found that there was clearly established law holding defendants' conduct was unconstitutional, but granted defendants qualified immunity because the opinions clearly establishing the law were published after defendants engaged in their unconstitutional conduct.[173] The rest offer what could be described as modest or incremental developments of the law, applying well-established constitutional principles to slightly different factual scenarios.[174]

168 Nielson & Walker, *supra* note 117, at 37 (collecting studies that show circuit courts, post-*Pearson* found constitutional violations but granted qualified immunity in 2.5–7.9% of decisions). Courts during the *Saucier* period more often found constitutional violations but granted qualified immunity, although such decisions were still relatively infrequent. *Id.* (collecting studies that show circuit courts, post-*Saucier*, found constitutional violations but granted qualified immunity in 6.5%–13.9% of decisions).

169 *See* Lane v. Franks, 134 S. Ct. 2369 (2014) (finding that a public employee's firing violated the First Amendment, but granting qualified immunity because the right was not clearly established); Safford v. Redding, 557 U.S. 364, 379 (2009) (finding that the strip search of a middle school student violates the Fourth Amendment, but granting qualified immunity because the right was not clearly established).

170 Nielson & Walker, *supra* note 117, at 34 (collecting studies that show circuit courts post-*Pearson* granted qualified immunity without ruling on the underlying constitutional claim in 18.9%–26.7% of claims).

171 *See* Nielson & Walker, *supra* note 43, at 1882–83.

172 *See* Appendix *infra*.

173 *See* Appendix *infra* (describing the holdings in *Rivers v. Fischer*, 390 F. App'x 22 (2d Cir. 2010); *Scott v. Fischer*, 616 F.3d 100 (2d Cir. 2010); *Schwenk v. County of Alameda*, 364 F. App'x 336 (9th Cir. 2010); *Hopkins v. Bonvicino*, 573 F.3d 752 (9th Cir. 2009)).

174 *See* Appendix *infra*; *see also, e.g.*, Karen M. Blum, *Qualified Immunity: Further Developments in the Post-*Pearson *Era*, 27 TOURO L. REV. 243, 255–59 (2011) (describing several additional cases in which courts have found constitutional violations but granted qualified immunity).

Moreover, there is no reason to believe that qualified immunity's shield from damages liability is what motivates courts' decisions to announce constitutional violations in these cases. Available evidence of indemnification and budgeting practices suggest that courts should not be overly concerned about damages awards against individual officers and agencies. Even if judges are unaware of these budgeting and indemnification dynamics, they are unlikely to face many cases in which there is such "massive financial liability" that it would cause a court to "constrain the definition of constitutional rights."[175] And even if an interest in shielding defendants from liability does sometimes encourage courts to decide constitutional questions while granting qualified immunity, other times courts issuing these decisions are, likely, simply applying the law[176]—concluding that defendants violated plaintiffs' constitutional rights but were entitled to qualified immunity because there was no "controlling authority in their jurisdiction"[177] or a "consensus of cases of persuasive authority"[178] with facts so closely resembling the instant case that "existing

175 Jeffries, *supra* note 142, at 248. In support of the constitutional innovation defense of qualified immunity, Jeffries imagines that if school desegregation cases from *Brown* to *Swann* and beyond were brought as damages class actions, courts would have been concerned that "imposing additional requirements on segregated school districts would trigger massive financial liability" and would have issued more tentative rulings as a result. *Id.* But such a case is unlikely to arise today, given the Court's stringent certification requirements for damages class actions. *See, e.g.*, Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013). And this type of class action would almost certainly be brought against a municipality, which—unlike individual officers—cannot raise a qualified immunity defense. Jeffries's concern is more apt, though, in a damages class action challenging state action. Because the state could not be named in such a case, plaintiffs would name individual state employees, who would be able to raise qualified immunity as a defense.

176 For research offering varying perspectives regarding the extent to which politics, ideology, and the law influences judicial decisionmaking see, for example, LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (2013) (arguing that ideology plays a role in all judicial decisionmaking and is particularly powerful as one moves up the judicial hierarchy); CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006) (identifying differences in the ways that Democrat- and Republican-appointed judges vote when the law is unclear); Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L. REV. 1895, 1898 (2009) (arguing that law, precedent, and deliberation are the primary determinants of judicial decisions); Jeffrey J. Rachlinski et al., *Judicial Politics and Decisionmaking: A New Approach*, 70 VAND. L. REV. 2051, 2051 (2017) (surveying state and federal judges about hypothetical cases and finding that "the aggregate effect of political ideology is either nonexistent or amounts to roughly one-quarter of a standard deviation"). For research suggesting that judges exercise *Pearson* discretion strategically, see Aaron J. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 EMORY L.J. 55 (2016).

177 Wilson v. Layne, 526 U.S. 603, 617 (1999).

178 *Id.*

precedent . . . placed the statutory or constitutional question beyond debate."[179]

Perhaps qualified immunity should be understood as encouraging constitutional innovation in a broader sense. Qualified immunity has been described as one component in a bundle of substantive laws, remedial doctrines, and other rules that courts calibrate to achieve an optimal system of rights and remedies.[180] By this logic, regardless of whether qualified immunity is invoked in a particular case, its existence allows courts to read the Constitution and other rules more expansively—and its elimination would cause courts to interpret the Constitution and other rules more narrowly. Qualified immunity arguably played this equilibrating role in *Arizona v. Gant*, a Supreme Court case limiting the circumstances in which an officer can conduct a warrantless vehicle search.[181] Justice Stevens, writing for the majority, addressed concerns that police officers had long relied on the prior legal rule, which allowed such searches, by observing in a footnote that "qualified immunity will shield officers from liability for searches conducted in reasonable reliance on that understanding."[182] We cannot know whether or to what extent the existence of qualified immunity encouraged the Court to issue this decision. It is certainly possible that the Court would not have limited warrantless vehicle searches in *Arizona v. Gant* if qualified immunity did not exist.

But it is just as easy to find a case in which the Court does not treat qualified immunity as an equilibrating force. In *Ziglar v. Abbasi*, the Supreme Court held *Bivens* actions cannot be brought regarding policy decisions made in time of war or national emergency in part out of concern that such litigation would result in "inquiry and discovery" about "sensitive functions" of the executive branch and national-security policy.[183] Justice Breyer, dissenting, observed that these concerns did not necessitate eliminating a *Bivens* remedy for this type of claim because there were already a number of other rules in place that would shield government officials from undue interference, including the scope of the Fourth Amendment, qualified immunity, plausibility pleading rules, and trial courts' abilities to limit discovery. Justice Breyer concluded:

> Given these safeguards against undue interference by the Judiciary in times of war or national-security emergency, the Court's abolition, or limitation of,

179 Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)).

180 Fallon, *supra* note 164, at 480 (explaining his "Equilibration Thesis," by which qualified immunity, along with other rights, justiciability doctrines, and rules of pleading and proof combine to achieve "the best overall bundle of rights and correspondingly calibrated remedies within our constitutional system"); Levinson, *supra* note 166, at 857–60 (describing his theory of "remedial equilibration," by which "rights and remedies are inextricably intertwined" and courts use restrictions in one area to allow corresponding expansions in others).

181 556 U.S. 332 (2009).

182 *Id.* at 349 n.11.

183 Ziglar v. Abbasi, 137 S. Ct. 1843, 1860–61 (2017).

> *Bivens* actions goes too far. If you are cold, put on a sweater, perhaps an overcoat, perhaps also turn up the heat, but do not set fire to the house.[184]

Although the equilibration idea makes sense, and the Supreme Court appeared to use qualified immunity in this manner in *Arizona v. Gant*, it is far from clear that the Supreme Court is adept at equilibrating, or that it does so very often. Evidence suggests qualified immunity is relatively rarely spurring innovation in circuit courts as well.[185] Qualified immunity doctrine cannot be justified based on such equivocal evidence of its benefits.

Moreover, to whatever extent qualified immunity spurs constitutional innovation, it is an unnecessarily blunt tool for this task. Even John Jeffries, who believes that "*some version of* qualified immunity should be the liability rule for constitutional torts"[186] to encourage constitutional innovation, criticizes the current doctrine for being "too technical, too fact-specific, and far too protective of official misconduct."[187] Specifically, Jeffries believes that the Court's requirement that law can only be clearly established with factually similar cases "has pushed qualified immunity far beyond the reach of any functional justification for that protection,"[188] and that the focus should instead be on whether an officer's conduct was "clearly unconstitutional."[189] This is a step in the right direction, but I would go further.

If a goal of qualified immunity is to spur constitutional innovation by assuring courts that there will be no financial fallout following a finding of unconstitutionality, there are other ways of achieving this goal.[190] The Supreme Court could limit the circumstances in which constitutional innovations are retroactively enforced.[191] Or courts could simply take to heart evidence that individual officers virtually never contribute to settlements and judgments entered against them.[192] Because officers are indemnified, eliminating qualified immunity would not dramatically expand officers' exposure to damages liability and should not, therefore, chill constitutional innovation.

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184 *Id.* at 1884 (Breyer, J., dissenting).

185 *See supra* note 168 (describing evidence of the frequency with which circuit courts find constitutional violations but grant qualified immunity); Appendix (illustrating the modest or incremental nature of circuit courts' development of the law in these cases).

186 Jeffries, *supra* note 142, at 249.

187 *Id.* at 264.

188 *Id.* at 253.

189 *Id.* at 264.

190 *Accord* Fallon, *supra* note 164, at 480 (recommending reconsideration of the extent to which qualified immunity doctrine is well-suited or necessary to achieve its intended goals).

191 *See id.* at 502–03 (discussing nonretroactivity doctrines as a means of encouraging expansion of constitutional rights).

192 *See supra* Section II.A. Courts can also take note of the fact that law enforcement agencies infrequently feel the financial consequences of lawsuits, and that lawsuit payouts are a miniscule part of most jurisdictions' budgets. *See supra* Section IV.A.

C. Qualified Immunity Cannot Be Justified as a Prefiling Filter

When the Supreme Court describes qualified immunity as a shield from the burdens of litigation in insubstantial cases, it always appears to suggest that the doctrine will achieve this goal through the quick dismissal of filed cases. But some defenders of the doctrine appear to believe that qualified immunity could achieve this goal by discouraging insubstantial cases from ever being filed.[193] Although my study of 1183 federal dockets makes clear that qualified immunity ends very few cases, it does not answer what role qualified immunity plays in case-filing decisions.[194] Accordingly, for a future project exploring the role that qualified immunity plays in the decision to file suit, I have surveyed attorneys from around the country who entered appearances in these 1183 cases and conducted in-depth interviews with a subset of these attorneys.[195] Based on the docket dataset, the surveys, and the interviews, I find three reasons to believe qualified immunity cannot be justified as a means of filtering out insubstantial cases before filing.[196]

First, the attorneys I interviewed reported taking into account a number of different considerations when deciding whether to accept a case, including the egregiousness of the facts, the strength of the evidence supporting the claim, whether a jury would find the plaintiff sympathetic, and the amount of recoverable damages. A majority of the attorneys I interviewed reported that qualified immunity was among their considerations when selecting a case, but many in this group suggested it did not play a controlling role in their decision-making process. Lawyers did not have the same views about which factors were the most important to consider, or how they should be considered together, but my interviews consistently reflected the multifaceted nature of attorneys' case-filing decisions. Accordingly, to the extent that qualified immunity is playing a role in case selection, it is playing a role mediated by a number of different concerns.

Second, to the extent that qualified immunity has an impact on case filing decisions, it is far from clear that the doctrine is filtering out only insubstantial cases. The attorneys who reported declining cases because of qualified immunity reported that the doctrine discourages the filing of cases concerning constitutional violations that are novel or ill-defined in circuit and Supreme Court opinions, and cases in which the costs of litigating qualified immunity would be greater than the damages at stake. One attorney reported that the challenges associated with litigating qualified immunity discouraged him from bringing Section 1983 cases altogether. None of these

193 *See, e.g.*, Andrew King, *Keep Qualified Immunity . . . For Now*, MIMESIS (July 1, 2016), http://mimesislaw.com/fault-lines/keep-qualified-immunity-for-now/11010 ("Mostly, but for qualified immunity, it's a bonanza for plaintiff's lawyers.").

194 *See generally* Schwartz, *supra* note 40.

195 *See* Joanna C. Schwartz, Qualified Immunity Selection Effects (unpublished manuscript) (on file with author).

196 Alex Reinert reached similar conclusions when he explored the impact of qualified immunity doctrine on plaintiffs' attorneys' decisions to file *Bivens* actions. *See* Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477 (2011).

responses suggest that qualified immunity is doing a good job of screening out only the "insubstantial" cases.

Third, a majority of the attorneys I interviewed reported that they rarely or never decline to bring a case because of qualified immunity. These attorneys are no fans of the doctrine—they believe that it increases the costs and risks of Section 1983 litigation, and several had had cases dismissed on qualified immunity grounds. Nevertheless, the attorneys offered several reasons why the doctrine does not discourage them from filing cases they would otherwise take. Some explained that the challenges posed by qualified immunity are replicated by other case-screening considerations. For example, several attorneys reported that concerns about judges' and juries' predispositions against police misconduct suits cause them to select cases with facts so egregious that they are not vulnerable to dismissal on qualified immunity. Others explained that they limit the effects of qualified immunity by including state law claims or municipal liability claims—that cannot be dismissed on qualified immunity grounds—in their cases. Some attorneys reported that they are not overly influenced by qualified immunity when selecting cases because the impact of qualified immunity on any given case is difficult to predict. And several attorneys made clear that they will accept a case they view as important to vindicate plaintiffs' rights or defend the Constitution, even if the case is vulnerable to attack on qualified immunity grounds.

Based on this limited sample, I cannot know the extent to which these attorneys' views are representative of those held by plaintiffs' attorneys around the country. But none of these observations support the hypothesis that qualified immunity serves its intended function as a shield against the burdens of litigation by screening out insubstantial cases before they are filed.

V. Moving Forward

The Supreme Court created qualified immunity based on a misunderstanding of common-law defenses in place when Section 1983 became law. The Court has justified its dramatic expansion of qualified immunity in the name of policy aims that the doctrine does not actually advance. The Court's qualified immunity jurisprudence hinders government accountability and inhibits the development of constitutional law. And alternative justifications for the doctrine are equally unconvincing. If the Supreme Court takes this evidence seriously, they should do away with or dramatically limit qualified immunity. And if the Supreme Court refuses to do so, lower courts can resolve qualified immunity motions in ways that mitigate some of the worst aspects of the doctrine.

A. The Supreme Court

If the Supreme Court accepts Justice Thomas's invitation in *Ziglar* to reconsider qualified immunity, takes seriously available evidence demonstrating that the doctrine neither comports with its historical antecedents nor

achieves its intended policy goals, and decides to take action, there are several possible paths forward.[197] The most dramatic course would be to eliminate qualified immunity or conform qualified immunity doctrine to common-law defenses in existence in 1871, when Section 1983 became law. If the Court is inclined to take this type of action, stare decisis should not be an impediment. Principles of stare decisis counsel against overruling statutory precedent and, instead, leaving modifications of such rules to Congress.[198] But Will Baude has observed that the Court does not treat qualified immunity as a "purely statutory doctrine left to the pleasure of Congress," and its perpetual "tinker[ing]" with the doctrine suggests "the Court takes more ownership of it than more orthodox statutory doctrines."[199] Moreover, Scott Michelman has argued that even if the Court views qualified immunity as statutory precedent, evidence that the doctrine has no common-law basis and fails to meet its policy objectives offer compelling reasons to overrule that precedent.[200]

If the Supreme Court is disinclined to overrule qualified immunity, it could, instead, revisit some of its prior decisions to better align the doctrine with evidence of its actual role in constitutional litigation. For example, in *Harlow*, the Court eliminated inquiry into officers' subjective intent so that qualified immunity could more easily be resolved at summary judgment.[201] The Court's narrow interpretation of "clearly established" law—requiring a prior finding of unconstitutionality in a very similar case from a circuit or the Supreme Court—may also be prompted by its interest in facilitating dismissal at summary judgment.[202] But the Court's subsequent decisions strengthening summary judgment standards arguably made *Harlow* unnecessary, as Justice Kennedy has observed.[203] Moreover, evidence that qualified immunity rarely ends cases at summary judgment confirms that the doctrine is ill-suited and unnecessary to shield government officials from trial.

The Supreme Court has recognized that its decision in *Harlow* significantly altered qualified immunity doctrine to protect government officials from the burdens of litigation. Now, faced with evidence that qualified

197 As things stand, the Justices appear moved by different critiques of qualified immunity, and so it is conceivable that a majority of the Court could vote to eliminate or restrict qualified immunity on different grounds. It is premature to consider how an opinion fractured in this way might impact the future of qualified immunity, but for a provocative and compelling argument about how plurality decisions should be read, see Richard Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. (forthcoming 2018).

198 *See* Baude, *supra* note 2, at 80.

199 *Id.* at 81.

200 *See* Scott Michelman, *The Branch Best Qualified to Abolish Qualified Immunity*, 93 NOTRE DAME L. REV. 1999 (2018).

201 *See generally* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

202 *See* John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 866 (2010) ("Much of the problem with 'clearly established' law derives from the effort to devise a substantive standard so narrowly 'legal' in character that it can be applied by courts on summary judgment or a motion to dismiss.").

203 *See* Wyatt v. Cole, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring).

immunity does not achieve these intended policy goals, and reasons to believe that the doctrine jeopardizes interests in government accountability, it is incumbent on the Court to revisit its standard. Plaintiffs should be able to defeat a qualified immunity motion by pointing to evidence of an officer's bad faith.[204] And the Court should broaden its definition of clearly established law—by making clear that courts of appeals can clearly establish the law, by defining clearly established law at a higher level of factual generality, and by recognizing obvious constitutional violations, as it did in *Hope*, without reference to an analogous case.[205] These adjustments would better calibrate the doctrine's balance between interests in advancing government accountability and interests in shielding government officials from litigation when they have acted reasonably.

Another possibility would be for the Court to keep the framework for qualified immunity largely intact but allow or encourage lower courts to consider whether qualified immunity would achieve its intended policy goals in particular cases. It makes no sense for government officials to receive qualified immunity if they are virtually certain to be indemnified, because those officials will suffer no financial consequences of a damages award.[206] It makes no sense to ignore evidence of government officials' subjective intent if such evidence is available when the qualified immunity motion is being decided. And it makes little sense for officials to receive qualified immunity at or after trial, because the doctrine will do nothing to shield officials in these cases from burdens associated with litigation. It should not overtax lower courts or litigants to take account of this type of evidence when deciding qualified immunity motions.[207] Encouraging lower courts to do so would

204 Given her recent concurrence in *Wesby*, Justice Ginsburg might be sympathetic to this adjustment to qualified immunity doctrine. *See* District of Columbia v. Wesby, 138 S. Ct. 577, 594 (2018) (Ginsburg, J., concurring in the judgment in part).

205 Justice Gorsuch's opinions on the Tenth Circuit suggest that he might be a vote in favor of relaxing the Court's standards for clearly established law. *See, e.g.*, A.M. v. Holmes, 830 F.3d 1123, 1170 (10th Cir. 2016) (Gorsuch, J., dissenting) (finding that it was clearly established that an officer could not arrest a seventh grader for burping in class because prior decisions did not allow arrest for minor distractions in class, and concluding he "would have thought this authority sufficient to alert any reasonable officer . . . that arresting a now compliant class clown for burping was going a step too far"). For further predictions about Justice Gorsuch's views on qualified immunity, see Shannon M. Grammel, *Judge Gorsuch on Qualified Immunity*, 69 STAN. L. REV. ONLINE 163 (2017).

206 If it turns out that other types of government officials more regularly contribute to settlements and judgments, the Court can factor this evidence into their analysis. *See supra* note 43 and accompanying text.

207 The first type of information—regarding a jurisdiction's indemnification policies and practices—should be in the possession of the jurisdiction and could be produced in response to an interrogatory or request for admission. The second type of information—evidence of an official's subjective intent—will presumably be produced by the plaintiff in opposition to the defendant's qualified immunity motion, if it is available. Such information may not be available at the motion to dismiss stage, and so may in some cases delay qualified immunity motion practice until after some discovery, but given the infrequency with which cases are dismissed on qualified immunity grounds before discovery, and

be a first step toward more coherence between the application of qualified immunity and the justifications offered for its existence.

B. Lower Courts

If the Supreme Court continues to issue qualified immunity decisions that ignore evidence about its fundamental flaws, lower courts may need to take matters into their own hands. They have at least two tools at their disposal. First, lower courts can do what Richard Re calls "narrowing from below."[208] Re describes narrowing from below as occurring when a court interprets Supreme Court precedent "reasonably" but "more narrowly than it is best read," and describes narrowing as legitimate when precedent is "ambiguous."[209] Supreme Court qualified immunity decisions are rife with ambiguity, and lower courts can decide to read those ambiguous decisions narrowly. Indeed, Justice Thomas's concurring opinion in *Ziglar* can even be read as an invitation for lower courts to do so.[210]

For example, the Supreme Court has held that a plaintiff can defeat a qualified immunity motion by showing an obvious constitutional violation,[211] but has also suggested that plaintiffs seeking to defeat qualified immunity must point to a case from the Supreme Court so factually similar that every officer would be on notice that the conduct at issue was unconstitutional.[212] The Supreme Court has regularly reversed (and sometimes chastised) lower courts for relying on cases to clearly establish the law that are insufficiently similar to the case at hand.[213] But perhaps litigants and lower courts should rely more heavily on *Hope v. Pelzer*'s admonition that there need not be a case on point when the constitutional violation is obvious.[214] As another example, the Supreme Court has never prohibited courts deciding qualified immunity motions from considering whether the purposes of qualified immunity would be advanced in a particular case. When deciding qualified immunity motions, lower courts should therefore take into account whether the defendant bringing the motion is at any risk of personal liability or

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defendants' and judges' apparent views that qualified immunity is more appropriate at the summary judgment stage, considering evidence of officers' subjective intent would not create much of a hardship. And the third type of information—regarding the stage of litigation at which the motion is brought—will be obvious to the court and parties.

208 *See generally* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921 (2016).

209 *Id.* at 925–26.

210 Ziglar v. Abbasi, 137 S. Ct. 1843 (2017) (Thomas, J., concurring in part and concurring in the judgment).

211 *See* Hope v. Pelzer, 536 U.S. 730 (2002).

212 *See, e.g.*, Reichle v. Howards, 566 U.S. 658, 665–66 (2012) ("Assuming *arguendo* that controlling Court of Appeals' authority could be a dispositive source of clearly established law in the circumstances of this case . . . .").

213 *See supra* note 3 (describing some of these cases).

214 *See generally* Hope v. Pelzer, 536 U.S. 730 (2002); *see also supra* note 205 (suggesting Justice Gorsuch might be sympathetic to this argument in some cases).

whether granting the motion would shield the defendant from discovery or trial.

Judges additionally have significant discretion to manage qualified immunity litigation practice in their courts and can do so in ways that address some of the concerns I have raised. When defendants file frivolous interlocutory appeals of qualified immunity denials, district courts should certify the appeals as frivolous and refuse to stay the cases.[215] When defendants file nonfrivolous interlocutory appeals of qualified immunity denials, circuit courts should make every effort to decide those appeals quickly. District court judges can require premotion conferences as part of their individual rules, and can discourage defendants from filing meritless qualified immunity motions that will increase costs and delay. District and circuit courts' rulings on qualified immunity motions can answer whether there was an underlying constitutional violation to assist in the development and articulation of constitutional principles, or explain why they are declining to do so.[216] None of these adjustments strike qualified immunity to the core, but are small steps that lower courts can take while waiting for the Supreme Court to make things right.

CONCLUSION

Qualified immunity doctrine is historically unmoored, ineffective at achieving its policy ends, and detrimental to the development of constitutional law. Scholarly defenses of the doctrine are similarly unpersuasive. The Court should not feel constrained by stare decisis given the questionable foundations of the doctrine and the liberty the Court has taken with its scope and structure over the fifty years of its existence. And there are many ways, short of downright repeal, that the Court could adjust the doctrine to better reflect its role in constitutional litigation. The key question, thus far unanswered, is whether the Court will answer these calls for reform.

Justice Thomas's concurrence in *Ziglar* offered some hope that the Court might soon take up these fundamental questions about qualified immunity. But the Court's next qualified immunity decision, in *Wesby v. District of Columbia*, suggests that we should not hold our collective breath for the Court to take action. Just six months after Justice Thomas critiqued qualified immunity in his concurrence in *Ziglar*, his opinion in *Wesby* dutifully applied the doctrine without comment or critique.[217] Despite concerns about qualified immunity previously raised in opinions authored or joined by a majority of the Court—Justices Breyer, Ginsburg, Kennedy, and Sotomayor, as well as Thomas—the Court was unanimous in its conclusion that the officers were

215 For one such decision relying in part on evidence about qualified immunity's role in constitutional litigation, see Wheatt v. City of East Cleveland, No. 1:17-CV-377, 2017 WL 6031816 (N.D. Ohio Dec. 6, 2017).

216 *See* Blum, *supra* note 119, at 1894–96 (offering this same suggestion).

217 District of Columbia v. Wesby, 138 S. Ct. 577 (2018).

entitled to qualified immunity.[218] Justice Thomas made no mention of his concerns that the doctrine looks nothing like the doctrine did in 1871, or that it is being used to advance the Court's "freewheeling policy choices."[219]

What explains the Court's continued, vigorous application of qualified immunity? It may be simply that the questions that Justice Thomas raised in *Ziglar* about qualified immunity were not briefed or argued by the parties in *Wesby*,[220] and the Court wants a fuller record with which to reassess the doctrine. If so, the Court will not have to wait very long. The Cato Institute has begun what it calls a "campaign to challenge and roll back qualified immunity" drawing on "the law and history of the doctrine, its effect on civil rights litigation, and the implications for police accountability."[221] And plaintiffs' attorneys have been invoking Justice Thomas's language in *Ziglar* in their petitions for writs of certiorari to the United States Supreme Court.[222] If even three Justices agree with Justice Thomas that qualified immunity doctrine should be reconsidered, the Court could grant one of these petitions and could direct the parties to address questions about the doctrine's common-law foundations, policy goals, and effects on government accountability in their briefs.

If the Court continues not to reconsider qualified immunity—despite all available evidence about the doctrine's failures, and periodic grumbling by various Justices about those failures—then something else must be at play. Perhaps the Court's continued application of qualified immunity reflects the

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218 *Id.*

219 Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) (quoting Rehberg v. Paulk, 132 S. Ct. 1497, 1502 (2012)).

220 Note, however, that the ACLU did raise these arguments in its amicus brief in *Wesby*. *See* Brief of the American Civil Liberties Union and the American Civil Liberties Union of the District of Columbia as Amici Curiae in Support of Respondents, District of Columbia v. Wesby, 138 S. Ct. 577 (2018) (No. 15-1485), 2017 WL 3098276.

221 *Qualified Immunity: The Supreme Court's Unlawful Assault on Civil Rights and Police Accountability*, CATO INST. (Mar. 1, 2018), https://www.cato.org/events/qualified-immunity-supreme-courts-unlawful-assault-civil-rights-police-accountability.

222 *See, e.g.*, Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit, Shafer v. Padilla, No. 17-1396, 2018 WL 1705603 (Apr. 3, 2018); Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit, Apodaca v. Raemisch, 2018 WL 1315085 (Mar. 9, 2018); Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit, Melton v. Phillips, No. 17-1095, 2018 WL 722531 (Feb. 2, 2018); Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit, Noonan v. Cty. of Oakland, No. 17-473, 2017 WL 4386875 (Sept. 27, 2017); Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Eighth Circuit, Doe v. Olson, No. 17-296, 2017 WL 3701814 (Aug. 23, 2017); Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit, Walker v. Farnan, No. 17-53, 2017 WL 2954392 (July 10, 2017); *see also* Brief in Opposition to Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit, S.C. Dep't of Corr. v. Booker, No. 17-307, 2017 WL 5714616, at 34 (Nov. 21, 2017) (arguing in opposition to a grant of certiorari but stating that "if the Court decides to grant certiorari it should add a question presented permitting it to revisit the doctrine of qualified immunity as a potential alternate ground for affirmance").

Court's hostility to plaintiffs more generally. Arthur Miller and Ninth Circuit Judge Stephen Reinhardt, among others, have argued that the Court's qualified immunity decisions should be understood as one of many procedural barriers erected or strengthened by the Roberts Court—including habeas corpus, civil pleading rules, and class certification requirements—in the name of protecting government and business defendants from burdens of litigation.[223] Although this theory might explain the votes of some of the Justices, I do not believe it fully explains the Court's qualified immunity jurisprudence. Several of the Court's opinions limiting plaintiffs' access to the courts through pleading, class certification, and arbitration restrictions have been hotly contested, resulting in 5–4 decisions with powerful dissents.[224] But the four Justices dissenting in *Iqbal*, *Wal-Mart*, and *Concepcion* have joined many of the Court's qualified immunity decisions without raising these same types of concerns.[225] I agree that qualified immunity functions much like these other procedural barriers, that each is justified by interests in protecting defendants from burdensome litigation, that each impedes plaintiffs' access to the courts, and that each frustrates adjudication of the merits of plaintiffs' claims. But it appears that some or all of the Justices either do not see qualified immunity doctrine in this way, or believe that qualified immunity properly protects government defendants at plaintiffs' expense.

My best guess is that members of the Court are reluctant to modify or eliminate qualified immunity doctrine for fear that doing so might impact constitutional litigation or policing in some previously unforeseen way that

223 *See* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286 (2013); Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1222 n.10 (2015).

224 *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

225 *See, e.g.*, White v. Pauly, 137 S. Ct. 548 (2017); Taylor v. Barkes, 135 S. Ct. 2042 (2015); City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015); Carroll v. Carman, 135 S. Ct. 348 (2014); Lane v. Franks, 134 S. Ct. 2369 (2014); Wood v. Moss, 134 S. Ct. 2056 (2014); Plumhoff v. Rickard, 134 S. Ct. 2012 (2014); Stanton v. Sims, 134 S Ct. 3 (2013); *cf.* Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (criticizing the Court for routinely summarily reversing denials of qualified immunity but rarely intervening when courts erroneously grant officers qualified immunity, and expressing concern that the Court's qualified immunity decisions "send[ ] an alarming signal to law enforcement officers and the public"); Salazar-Limon v. City of Houston, 137 S. Ct. 1277, 1282–83 (2017) (Sotomayor, J., dissenting from the denial of certiorari) ("We have not hesitated to summarily reverse courts for wrongly denying officers the protection of qualified immunity in cases involving the use of force. But we rarely intervene where courts wrongly afford officers the benefit of qualified immunity in these same cases. The erroneous grant of summary judgment in qualified-immunity cases imposes no less harm on 'society as a whole,' than does the erroneous denial of summary judgment in such cases." (citations omitted) (quoting *Sheehan*, 135 S. Ct. at 1774 n.3)); Mullenix v. Luna, 136 S. Ct. 305, 313 (2015) (Sotomayor, J., dissenting).

would harm "society as a whole."[226] For reasons that I will explain in future work, I do not believe such fears to have foundation.[227] Instead, I predict that eliminating qualified immunity would not significantly expand the scope of constitutional protections, dramatically increase the number of filings or awards, or otherwise open the floodgates to insubstantial claims. Moreover, indemnification and budgeting practices would continue to give government officials limited incentives to comply with the Constitution. This is not to say that eliminating qualified immunity would not impact constitutional litigation. To the contrary, I believe eliminating qualified immunity would have important benefits: it would clarify the law, reduce the costs and complexity of litigation, and shift the focus of Section 1983 litigation to what should be the critical question at issue in these cases—whether government officials exceeded their constitutional authority. The Court might not find these predictions to be convincing. But it cannot justify such a significant defense based on some sense in the air about how constitutional litigation or policing might be different in qualified immunity's absence.

A few years ago, Justice Anthony Kennedy gave a speech in which he observed: "To re-examine your premise is not a sign of weakness of your judicial philosophy. It's a sign of fidelity to your judicial oath."[228] I hope that Justice Kennedy and his colleagues, taking these words to heart, will agree to reexamine the premises underlying qualified immunity. And I hope that, when they do, they take the dramatic action that is compelled by the record.

226 *White*, 137 S. Ct. at 551 (quoting *Sheehan*, 135 S. Ct. at 1774 n.3); *accord* Samuel R. Bagenstos, *Who Is Responsible for the Stealth Assault on Civil Rights?*, 114 MICH. L. REV. 893, 911 (2016) (reviewing SARAH STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT (2015)) (suggesting that liberal Justices' sympathy for qualified immunity may be an outgrowth of a "New Democrat" tough-on-crime ideology).

227 *See generally* Schwartz, *supra* note 18.

228 Mark Sherman, *Justice: Changing Course on the Bench Is Not Weakness*, SEATTLE TIMES (Sept. 23, 2016), https://www.seattletimes.com/nation-world/nation-politics/justice-changing-course-on-the-bench-is-not-weakness/.

APPENDIX

This Appendix sets out the holdings in the cases in Nielson and Walker's study[229] in which courts of appeals found a constitutional violation but granted qualified immunity because the right was not clearly established.

Case	**Holding**
Akrawi v. Remillet, 504 F. App'x 450 (6th Cir. 2012).	Finding that Michigan Parole Board's decision to put plaintiff back on parole without a hearing violated his due process rights, and awarding plaintiff injunctive relief, but affirming the district court's decision to grant officials qualified immunity. Although the Supreme Court established in 1972 that there is a due process right to a hearing before being returned to prison for a parole violation, it was not clearly established that the return to parole constitutes a "grievous loss" deserving of procedural protections.
Amore v. Novarro, 610 F.3d 155 (2d. Cir. 2010), *amended and superseded by* 624 F.3d 522 (2d Cir. 2010).	Finding that plaintiff's Fourth Amendment rights were violated when officer arrested him under New York Penal Law Section 240.35(3) because the statute had been ruled unconstitutional by the New York Court of Appeals eighteen years before, but reversing the district court's denial of qualified immunity because the State of New York had not formally repealed section 240.35(3) at the time of plaintiff's arrest.
Ass'n for Los Angeles Deputy Sheriffs v. County of Los Angeles, 648 F.3d 986 (9th Cir. 2011).	Finding that current and former deputy sheriffs had stated a claim that their due process rights were violated because the deputies—who had been charged with felonies, suspended, reinstated after suspension, and then discharged—were not afforded postsuspension hearings, but finding the Civil Service Commissioners were entitled to qualified immunity because, based on a California Court of Appeals decision, they "would have believed that denying jurisdiction over the appeals of retired deputies was lawful." (Note that the Ninth Circuit denied qualified immunity to the County Supervisors and Sheriff, who should have provided an alternative hearing for the retired employees.)

229 Nielson & Walker, *supra* note 117.

Case	Holding
Bryan v. MacPherson, 608 F.3d 614 (9th Cir. 2010), *withdrawn and superseded by* 630 F.3d 805 (9th Cir. 2010).	Finding that, taking the facts in the light most favorable to the plaintiff, an officer violated the Fourth Amendment when he used a Taser against a plaintiff who "was obviously and noticeably unarmed, made no threatening statements or gestures, did not resist or attempt to flee, but was standing inert twenty to twenty-five feet away from the officer," yet holding defendants were entitled to qualified immunity because the Ninth Circuit had not previously established that Tasers constitute an "intermediate, significant level of force that must be justified by the government interest involved."
Burke v. County of Alameda, 586 F.3d 725 (9th Cir. 2009).	Finding that, taking the facts in the light most favorable to the plaintiff, defendants violated plaintiff's constitutional right of familial association by putting his daughter into protective custody without first contacting him to see whether she could be put in his care, but holding defendants were entitled to qualified immunity because it was not clearly established that noncustodial parents had a protected interest in the custody and management of their children.
Burns v. Pa. Dep't of Corrections, 642 F.3d 163 (3d Cir. 2011).	Finding that plaintiff's due process rights were violated when his inmate account was assessed—but not deducted—without considering available evidence "to determine its relevance and suitability for use at a disciplinary hearing," but finding that defendants were entitled to qualified immunity. Although it was established at the time of the action that procedural due process rights protected an inmate's account from being debited, it was not clearly established that these rights attached before an inmate's account was assessed.
Castle v. Appalachian Tech. Coll., 627 F.3d 1366 (11th Cir. 2010), *vacated and superseded by* 631 F.3d 1994 (11th Cir. 2011).	Finding that plaintiff's due process rights were violated when she was not offered a predeprivation hearing before being suspended from a nursing program, but affirming the lower court's grant of qualified immunity because of "the complicated factual issues surrounding the investigation of [plaintiff's] conduct" and because "the administrators made known to [plaintiff] that she could immediately appeal their determination, which [plaintiff] did within a few days."

Case	Holding
Chambers v. Pennycook, 641 F.3d 898 (8th Cir. 2011).	Taking the facts in the light most favorable to the plaintiff, his constitutional rights were violated when a police officer "kicked him several times on both sides of his body, although he was restrained on the ground and offering no resistance," another officer "repeatedly choked and kicked him during the trip to the hospital," and a third officer "extended the journey by taking a roundabout route and intentionally driving so erratically that [plaintiff] was jerked roughly back and forth in his car seat while his head was positioned adjacent to the dashboard," but finding defendants were entitled to qualified immunity because it was not clearly established in the Eighth Circuit that plaintiffs could recover under the Fourth Amendment for *de minimus* injuries.
Coates v. Powell, 639 F.3d 471 (8th Cir. 2011).	Finding that defendant officer violated plaintiff's Fourth Amendment rights by remaining in the plaintiff's house for ten to fifteen minutes after consent was revoked, but finding defendant was entitled to qualified immunity because "it was not clearly established at the time of this incident that an officer was required to leave a private home in the middle of a child neglect investigation."
Concepción Chaparro v. Ruiz-Hernández, 607 F.3d 261 (1st Cir. 2010).	Affirming district court decision that former employees, whose employment was terminated five months shy of the expiration of their one-year contracts with the municipality, had a reasonable expectation of continued employment with the municipality, but finding that officers who fired them were entitled to qualified immunity because Puerto Rico law was unclear as to whether employees had any rights to continued employment once funding for their positions ended.
Cordova v. Aragon, 569 F.3d 1183 (10th Cir. 2009).	Taking facts in the light most favorable to the plaintiff, officer violated decedent's constitutional rights by shooting him in the back of the head as he was driving away—the decedent was driving recklessly and was attempting to ram police cars, but no other motorists were in the vicinity and the officer was not in danger—but finding the officer was entitled to qualified immunity because "[t]he law in our circuit and elsewhere has been vague on whether the potential risk to unknown third parties is sufficient to justify the use of force nearly certain to cause death."

Case	Holding
Costanich v. Dep't of Soc. & Health Servs., 627 F.3d 1101 (9th Cir. 2010).	Finding that plaintiff "had a Fourteenth Amendment due process right to be free from deliberately fabricated evidence in a civil child abuse proceeding" but finding defendants were entitled to qualified immunity because that right was not clearly established in the civil context (though it had been clearly established in criminal child abuse proceedings).
Decotiis v. Whittemore, 635 F.3d 22 (1st Cir. 2011).	"Allegations that speech therapist was speaking as a citizen, rather than in her capacity as a speech and language therapist when providing information to clients' parents about advocacy groups and urging them to contact the groups" was sufficient to state a First Amendment retaliation claim, but finding defendants were entitled to qualified immunity because, at the time of the alleged retaliatory action, "[t]here was no decision in this circuit explaining the scope of a public employee's employment duties and what it means to speak pursuant to those duties, nor was there a body of decisions from other circuits that could be said to have put [defendant] on clear notice. Even though the broad constitutional rule . . . may have been clearly established, the contours of the right were still cloudy."
Delia v. City of Rialto, 621 F.3d 1069 (9th Cir. 2010), *rev'd on other grounds* Filarsky v. Delia, 566 U.S. 377 (2012).	Finding that plaintiff's participation in "internal affairs investigation into his off-duty activities was coerced by direct threat of sanctions and not voluntary, and therefore, violated the Fourth Amendment," but finding the defendants were entitled to qualified immunity because "[t]his case does not fit neatly into any previous category of Fourth Amendment law."
Doe *ex rel.* Johnson v. South Carolina Dep't of Soc. Servs., 597 F.3d 163 (4th Cir. 2010).	Finding that the state violated a child's substantive due process rights when it involuntarily removed her from her home and put her a "known, dangerous" foster care placement "in deliberate indifference to her right to personal safety and security" but finding the defendant was entitled to qualified immunity because "[i]t would not have been apparent to a reasonable social worker in [defendant's] position that her actions violated the Fourteenth Amendment."

Case	Holding
Doe *ex rel.* Magee v. Covington Cty. Sch. Dist., 649 F.3d 335 (5th Cir. 2011), *reh'g en banc* 675 F.3d 849 (5th Cir. 2012).	Finding that public elementary school had violated nine-year-old child's substantive due process rights by allowing an adult male claiming to be her father to take her off school grounds without verifying the adult's identity, but finding that defendants were entitled to qualified immunity because the Fifth Circuit "ha[s] not expressly held that a very young child in the custody of a compulsory-attendance public elementary school is necessarily in a special relationship with that school when it places her in the absolute custody of an unauthorized private actor." (Note that, on rehearing en banc, the Fifth Circuit found that plaintiff had not alleged a constitutional violation).
Elkins v. District of Columbia, 690 F.3d 554 (D.C. Cir. 2012).	Finding that defendant's seizure of a notebook in the search of a home violated the Fourth Amendment when the warrant only authorized visual inspection, but finding that the defendant was entitled to qualified immunity because she was a junior member of the search team and relied on her supervisor's judgment that it was appropriate to seize the notebook.
Elwell v. Byers, 699 F.3d 1208 (10th Cir. 2012).	Finding that preadoptive foster parents' rights to due process were violated when a state agency removed foster child from their home without any advance notice, where there were no immediate concerns or emergency justifying lack of process, but finding defendants were entitled to qualified immunity because it was not clearly established that preadoptive parents possess a liberty interest in maintaining their family structure.
Escobar v. Mora, 496 F. App'x 806 (10th Cir. 2012).	Finding that plaintiff stated a claim for an Eighth Amendment violation regarding state corrections officers' allegedly spitting into his food, an event that caused him to suffer "mental and psychological distress and anguish" and lose thirty pounds, but finding that defendants were entitled to qualified immunity because "there are no controlling decisions on point" and prior decisions did not put defendants on "fair notice that their conduct rose to the level of a constitutional violation."

Case	Holding
García-Rubiera v. Calderón, 570 F.3d 442 (1st Cir. 2009).	Finding that plaintiffs stated a claim that the Governor and Secretary of Treasury violated Takings and Due Process Clauses by permanent retention of accrued interest from duplicate payments of premiums under Commonwealth's compulsory motor vehicle liability insurance law, but affirming district court's grant of qualified immunity because "the law did not clearly establish that . . . withholding any of the designed Reserve . . . [and the interest it generates] was an unconstitutional taking" and "the law was not clearly established that . . . the custodial transfer of funds pursuant to a Commonwealth statute and the provision of a compensation procedure did not comport with due process requirements."
Greene v. Camreta, 588 F.3d 1011 (9th Cir 2009), *vacated in part by* 661 F.3d 1201 (9th Cir. 2011).	Fourth Amendment rights of a child were violated when child protective services caseworker and deputy sheriff "seized and interrogated [her] in a private office at her school for two hours without a warrant, probable cause, or parental consent," but finding the right was not clearly established because prior decisions concerned children searched or seized at home, among other reasons. (Note that the decision was appealed, the Supreme Court vacated as moot the portion of the opinion addressing the Fourth Amendment issue, and so the Ninth Circuit's 2011 opinion vacated the court's decision about the Fourth Amendment.)
Harman v. Pollock, 586 F.3d 1254 (10th Cir. 2009).	Finding that officers' search of plaintiffs' apartment could not be justified by exigent circumstances, but concluding that officers were entitled to qualified immunity because "we cannot say the Officers' actions were plainly incompetent or knowing violations of the law."

Case	Holding
Henry v. Purnell, 619 F.3d 323 (4th Cir. 2010), *reh'g en banc* 652 F.3d 524 (4th Cir. 2011).	Finding that material disputes exist about the reasonableness of an officer's actions who fired his Glock instead of a Taser and failed to warn the victim before doing so, failed to utilize the laser sight, and failed to distinguish the different safety locks, but concluding that officer was entitled to qualified immunity because he would not know that "an act of weapon confusion of the firearm for the taser was 'clearly established' as an excessive use of force under the Fourth Amendment." (Note that on rehearing en banc, the Fourth Circuit reversed and found no qualified immunity.)
Hopkins v. Bonvicino, 573 F.3d 752 (9th Cir. 2009).	Finding that the defendant officers violated the plaintiff's Fourth Amendment rights when they arrested him following a citizen's arrest without "independent probable cause," but granting officers qualified immunity. The Ninth Circuit had previously held police officers must have independent probable cause when effectuating a municipal bus driver's citizen arrest, but it was unclear whether the same rules would apply for arrests made by a person who is not "acting as an agent of the state."
Hunt v. County of Orange, 672 F.3d 606 (9th Cir. 2012).	Finding that plaintiff's First Amendment rights were violated when he was placed on administrative leave and then demoted for campaign speech, and finding that this right was clearly established, but concluding that the defendant was entitled to qualified immunity because a reasonable official in defendant's position would not have known that the plaintiff was not a policymaker whose political loyalty was important to the effective performance of his job.
Koch v. Lockyer, 340 F. App'x 372 (9th Cir. 2009).	Finding that defendants violated plaintiff's Fourth Amendment rights when they forcibly collected his DNA without a warrant because he was not convicted of an offense that required DNA collection, but concluding that the defendant was entitled to qualified immunity; given "the complexity and novelty of the issues presented" in the case, "reasonable officials could not have understood that their actions violated Koch's constitutional rights."

Case	Holding
Kozel v. Duncan, 421 F. App'x 843 (10th Cir. 2011).	Finding that the sheriff violated plaintiffs' Fourth Amendment rights when his deputies seized patrons of a dance club "for over an hour and lined them up for sobriety checks," but concluding that the sheriff is entitled to qualified immunity. "While the proscription against warrantless 'wholesale searches and seizures' of a business open to the public is well established, it is too general to provide notice that officers violate a bar owner's constitutional rights by detaining patrons for sobriety checks after receiving reports of underage drinking in a bar with a cup policy that may facilitate underage drinking."
Melgar v. Greene, 593 F.3d 348 (4th Cir. 2010).	Finding that officer may have violated the plaintiff's Fourth Amendment rights by using a patrol dog without a muzzle and with a long lead to find a missing boy, but concluding that the defendant was entitled to qualified immunity; although there were other cases finding constitutional violations for the use of police dogs who were released from their leashes when searching for criminals, in this case the dog was kept on a leash to locate a missing person. "Cases addressing the former simply do not provide sufficient guidance to officers in the latter situation."
Moss v. Martin, 614 F.3d 707 (7th Cir. 2010).	Finding that plaintiff's First Amendment rights were violated when he was fired on the basis of his political beliefs, but concluding that the defendants were entitled to qualified immunity. Although the government cannot take most employees' political beliefs into account, there is an exception for positions involving "confidential or policymaking responsibilities." "Given the uncertainty that litigants encounter in this somewhat murky area of the law, it is difficult for a plaintiff to avoid a qualified immunity defense in a case of first impression unless she occupies a low rung on the bureaucratic ladder."
Randall v. Scott, 610 F.3d 701 (11th Cir. 2010).	Finding that plaintiff's First Amendment rights were violated when he was fired for running for political office but concluding that defendants were entitled to qualified immunity; although there is an established "constitutional right to run for office," the court was "aware of no precedential case with similar facts."

Case	Holding
Reher v. Vivo, 66 F.3d 770 (7th Cir. 2011).	Finding that officer did not have probable cause to arrest plaintiff for disorderly conduct based only on information that plaintiff had been accused of going go a park to look at and videotape children and that a crowd at the park was upset, but concluding the officer was entitled to qualified immunity because, under the circumstances, the officer "could have reasonably, but mistakenly, believed" that probable cause existed.
Rivers v. Fischer, 390 F. App'x 22 (2d Cir. 2010).	Finding that plaintiff's constitutional rights were violated when the "Department of Corrections administratively imposed a 5-year term of supervised release that was not orally pronounced by the sentencing judge," and that right was established in a 2010 case from the Second Circuit, but finding qualified immunity was appropriate because the case had not yet been decided when the sentence in this case was imposed.
Rock for Life—UMBC v. Hrabowski, 411 F. App'x 541 (4th Cir. 2010).	Finding that defendants may have violated plaintiffs' First Amendment rights by relocating their Genocide Awareness Project display, but concluding defendants were entitled to qualified immunity because it was a reasonable mistake. "If the defendants secured campus safety at too high a cost to the plaintiffs' right to free expression, we do not believe they should be made to pay for this mistake from their own pockets."
Saavedra v. Scribner, 482 F. App'x 268 (9th Cir. 2012).	Finding that a state prisoner's due process rights were violated because he got inadequate notice of the charges against him before being put into administrative segregation, and inadequate notice of subsequent disciplinary proceedings, but finding that defendants were entitled to qualified immunity "[b]ecause our cases do not give adequate guidance both regarding the level of specificity required in a . . . notice and on ensuring timely delivery" of notice of charges, and because "[i]t would not be apparent to a prison official that he needed to disclose more than [the charge and some factual basis for the charge] in a notice to initiate disciplinary proceedings, especially where a portion of the evidence used to support the disciplinary action was legitimately confidential."

Case	Holding
San Geronimo Caribe Project v. Acevedo-Vila, 650 F.3d 826 (1st Cir. 2011), *reh'g en banc*, 687 F.3d 465 (1st Cir. 2012).	Finding that developer stated a claim that his due process rights were violated when construction permits were held in abeyance for sixty days despite the fact that construction was under way, but concluding defendants were entitled to qualified immunity because prior precedent "could have led the defendants to believe that they were not required to provide a meaningful predeprivation hearing and that . . . providing postdeprivation remedies was all the process that was due." (Note that, at rehearing en banc, the First Circuit found no procedural due process violation.)
Schmidt v. Creedon, 639 F.3d 587 (3d Cir. 2011).	Finding that, taking the evidence in the light most favorable to the plaintiff, his due process rights were violated because he had a right to a hearing before being suspended from his job, but concluding defendants were entitled to qualified immunity. The Supreme Court had established that, "absent extraordinary circumstances, certain state employees were entitled to a hearing prior to termination," but "it was not clearly established in 2006 whether this rule applied when appropriate post-suspension union grievance procedures were available to suspended employees."
Schwenk v. County of Alameda, 364 F. App'x 336 (9th Cir. 2010).	Finding that mother had a legal basis to challenge the seizure of her son, based on a Ninth Circuit case decided in 2009 holding that "parents with legal custody, regardless of whether they also possess physical custody of their children have a liberty interest in the care, custody, and management of their children," but affirming the district court's dismissal of the case on qualified immunity grounds because "[a]t the time of the alleged conduct, we had not yet decided" that case.
Scott v. Fischer, 616 F.3d 100 (2d Cir. 2010).	Finding that the administrative imposition of mandatory postrelease supervision without a judicial sentence violated the plaintiff's due process rights, but concluding that qualified immunity was appropriate because the Second Circuit decision clearly establishing this right had not yet been decided when the plaintiff's sentence was imposed.

Case	Holding
Solis v. Oules, 378 F. App'x 642 (9th Cir. 2010).	Finding that defendant officer "violated [plaintiff's] Fourth Amendment right to be free from unreasonable searches and seizures when he stopped her vehicle and apparently removed her from it under a law that did not criminalize her behavior," but concluding that defendant was entitled to qualified immunity because the officer's mistake "would not have been necessarily clear to a reasonable officer under the circumstances" given "uncertainty on the face of the statute."
Stoot v. City of Everett, 582 F.3d 910 (9th Cir. 2009).	Finding that defendant officer violated juvenile's Fourth Amendment rights by seizing him and interviewing him regarding suspected child molestation but finding the officer was entitled to qualified immunity because plaintiffs "have not cited a single case squarely holding that an officer cannot rely solely on the statements of a child sexual assault victim obtained during a personal interview to establish probable cause."
Taravella v. Town of Wolcott, 599 F.3d 129 (2d Cir. 2010).	Finding that plaintiff alleged a violation of her due process rights when she was fired from her government job, but finding defendant was entitled to qualified immunity because her employment agreement was ambiguous and "it cannot be said that the defendant acted unreasonably when he interpreted the ambiguous contract one way instead of another."
Thompson v. Williams, 320 F. App'x 678 (9th Cir. 2009).	Finding that there were triable issues about whether a prison's policy not to provide the plaintiff with a Halal or Kosher diet violated his First Amendment rights or RLUIPA, but concluding that "it was not clearly established at the time of the violation" that the defendants were required to do so.

Case	Holding
Toevs v. Reid, 646 F.3d 752 (10th Cir. 2011), *amended and superseded*, 685 F.3d 903 (10th Cir. 2012).	Finding that plaintiff's due process rights were violated because he was not informed of the reasons he was recommended for or denied progression in a stratified incentive program in a prison, but concluding defendants were entitled to qualified immunity. Although the Supreme Court "clearly established that prisoners cannot be placed indefinitely in administrative segregation without receiving meaningful periodic reviews," "it was not clearly established in 2005 through 2009 that the review process was inadequate" and "this court has never considered the due-process implications of a stratified incentive program."